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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DONALD CLARK

Petitioner,

VS.

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Brief for Petitioner

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QUESTION PRESENTED

1. In applying the Federal Sentencing Guidelines, may the District Court attribute the entire one million marijuana plant output, of a 10 year, 28 man conspiracy, to the Defendant by simply adopting the United States Probation Officer's Pre-sentence Investigation Report without making any specific, individualized findings of fact as to the scope of the Defendant's agreement to undertake criminal activity and without making specific, individualized findings as to what actions of others were reasonably foreseeable to the Defendant in connection with scope of his agreement?

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OCTOBER TERM, 1994

NO.

DONALD CLARK

Petitioner,

vs.

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

The Petitioner, Donald Clark, (hereinafter "Mr. Clark"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above referenced matter on January 5, 1994

OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals is Reported at 13 F.3d 409 (11th Cir. 1994). The Eleventh Circuit Per Curium Affirmed the conviction and sentence of the Defendant and issued a brief unpublished opinion. Their writing is reproduced in the Appendix hereto. (App. C-1). The Eleventh Circuit also Denied a Petition for Rehearing and a Suggestion for Rehearing En Banc without an opinion. (App. D-1).

JURISDICTION

Mr. Clark's Petition seeks review of the Judgment of the Eleventh Circuit Court of Appeals entered on January 5, 1994. (App. C-1). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). This Petition presents to this Court a question which the United States District Court of Appeals for the Eleventh Circuit has answered in a manner which is in conflict with other decisions of the Eleventh Circuit and in conflict with decisions of another United States court of appeals on the same matter. The cases which this decision is in conflict with are U.S v. Ismond, 993 F.2d 1498, (11th Cir. 1993), U.S. v. Young, No. 93-3551, 1994 U.S. App. LEXIS 24097 (7th Cir. Sept. 2, 1994).

Additionally, the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

A Petition for Rehearing and A Suggestion for Rehearing En Banc were denied on July 19, 1994. (App. D-1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

1. **21 U.S.C. § 846.**

Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

2. **28 U.S.C. § 1254(1)**

Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to

any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instruction are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

3. **Federal Sentencing Guideline § 1B1.3**

Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or wilfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and commissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or

plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above; and all harm that was object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

4. **Supreme Court Rule 10.1(a): (type provision).**

Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When the United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last report; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

STATEMENT OF THE CASE

A. Nature of the Case.

Mr. Clark appealed his criminal conviction in the United States District Court for the Middle District of Florida, Tampa Division to the Eleventh Circuit Court of Appeals. After the Briefs in Mr. Clark's appeal had been filed, but while the appeal was still pending, the Eleventh Circuit decided some cases which had a direct bearing on an issue which Mr. Clark was arguing on appeal. This issue dealt with the relevant conduct of Mr. Clark and how much of the marijuana generated by this 10 year approximately 100 person (28 indicted and approximately 80 unindicted co-conspirators) conspiracy could be attributed to Mr. Clark when the evidence at trial clearly showed Mr. Clark's direct involvement was minimal. Counsel for the Appellant sent the Eleventh Circuit a Notice of Supplemental Authority for the case of United States v. Clavis, 977 F.2d 538 (11th Cir. 1992). Clavis was a co-defendant of an individual in a separate appeal that was decided shortly thereafter and was directly on point in Mr. Clark's case. The Eleventh Circuit's decision in U.S. v. Ismond, 993 F.2d 1498 (11th Cir. 1993) was the case which the Appellant believed was directly on point with the relevant conduct issue which was pending on Mr. Clark's appeal.

Despite the decision in the Ismond case by the same court, Mr. Clark's appeal was Per Curium Affirmed on January 5, 1994 with the Court writing a brief, unpublished opinion. (Appendix C). The unpublished opinion did not address the relevant conduct issue argued by the Defendant and subsequently addressed in Ismond. Based on the Order affirming the District Court's decision, Mr. Clark filed a Petition for Rehearing and a Suggestion for Rehearing En Banc. The Eleventh Circuit treats a Suggestion En Banc as a Petition for Rehearing, if en banc consideration is not given. (11th Circuit Local Rule 35-6). En banc consideration was not given in Mr. Clark's case and the original justices considered the Petition for Rehearing. The Petition for Rehearing was denied on July 19, 1994, without an opinion. Mr. Clark is now petitioning this Court for a Writ of Certiorari to review the relevant conduct issue. To determine relevant con-

duct, the following issue must be addressed: whether it was proper to hold Mr. Clark responsible for the entire output of the conspiracy when the District Court failed to make individualized findings as to both the scope of his agreement to undertake criminal activity and as to whether it was reasonably foreseeable, based on his agreement, that the entire conspiracy would involve one million marijuana plants.

B. The Facts of the Case.

Myakka City, located in Manatee County, Florida, has two stores, a post office, and a couple of churches. R 13-9[1]. According to the government, Myakka City was the home of "Myakka Gold, marijuana." R 15-6. Myakka City was also the home of the Appellant, Donald Clark. Mr. Clark had a farm that consisted of a couple of trailers and a barn. R 13-35, 37. The farm consisted of approximately 640 acres and was five or six miles from Myakka City. R 13-31.

On May 24, 1985, Manatee County Sheriff's Deputy John Potts executed a search warrant on Mr. Clark's farm. R 13-29. This search yielded evidence which lead to Mr. Clark's arrest and conviction on State of Florida charges of possession of cocaine, possession of marijuana with intent to sell, possession of marijuana, and manufacture of marijuana. Government Exhibit (GE) 186.[2] During his arrest on these charges Mr. Clark admitted that he had been growing marijuana, though there was no indication that he mentioned anyone else's involvement. R 13-84. Notably, Mr. Clark was not then charged with any type of conspiracy.

In 1987, Deputy Potts again visited the Clark farm. R 13-70. At that time Mr. Clark was charged with possession of marijuana and possession of a firearm by a convicted felon. GE 187.[3] Again, there was no indication that Mr. Clark was involved with anyone else, or that he was cultivating marijuana at that time.

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1 References are to the Record on Appeal.

2 As a result of the charges filed against him as a result of this search, Mr. Clark was sentenced to 18 months in prison, (imposition of which was stayed) and two years community control.

The years 1986 and 1987 led to events which resulted in the indictment of Mr. Clark and his twenty-seven co-defendants. In 1986, Manatee County Sheriff's Deputy John Potts arrested Gary Huffman for fleeing and eluding a police officer and resisting arrest without violence. R 12-143. In the following year, 1987, Manatee County Sheriff's Deputy David Livingston arrested Mr. Bruce Hendry and Mr. Timothy Young for possession of approximately 2,000 marijuana plant seedlings. R 7-13. Huffman, Hendry, and Young became the so-called "insiders" who provided the lion's share of the direct testimony against Mr. Clark at trial. Furthermore, the information provided by these "insiders" to the case agents made up a large part of the case agents' testimony against Mr. Clark.

Against this historical background the trial of Mr. Clark took place. Despite approximately 15 days of trial, testimony of Mr. Clark's conspiratorial activities with other persons was surprisingly sparse. A review of this testimony follows;

Bruce Hendry testified that in 1980 or 1981, while working on the Clark farm, Donald Clark provided him marijuana to smoke. R 7-38, 39, 40, 41. In 1983, Hendry grew a marijuana crop in partnership with Philip Coker. R 7-44. Coker had requested Hendry's help with the crop in return for fifty percent of the field. R 7-45. Coker told Hendry that Donald Clark originally supplied Coker with the materials necessary to grow the field. In return Mr. Clark was supposed to receive 50% of the crop. However, by his own choice, Donald Clark never received any of the marijuana crop. R 7-46, 51. Hendry believed that Donald Clark was no longer involved with the field because Clark had seen how poorly the field was doing and told Coker to keep the crop. R 7-60.

Hendry also testified that throughout the 1980's he and Mr. Clark had general conversations about various methods of growing marijuana,

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3 At this time Mr. Clark was sentenced to 18 months in prison.

though there was no testimony that they ever grew together. R 7-86, 87. In January of 1985, two years after his involvement in the one field with Coker, Hendry and Donald Clark agreed to grow marijuana seedlings together in a light room on the farm. Also in early 1985, Hendry agreed to sell some marijuana for Donald Clark. R 7-94, 95. This testimony constituted the extent of Hendry's involvement with the Appellant Donald Clark, though Hendry testified, not mentioning Donald Clark, that in 1985 he helped Gary Clark, the Appellant's son, grow a field on the farm. R 10-94.

According to Hendry, 7 or 8 growers in the Myakka area would exchange information among themselves about how to grow marijuana. There were 10 growers in the area. R 7-146, 151. Hendry did not name the Appellant Donald Clark as one of those who exchanged information. According to Hendry, these growers who exchanged information kept the location of their fields secret even from each other as the growers were independent of each other and competitors. R 7-147, R 10-59.

Philip Coker confirmed the details of the 1983 partnership with Hendry. R 10-101. Coker also testified that Donald Clark told him that Clark had taught Hendry, his two sons (Duane and Gary), and Bosie Gill to grow marijuana. R 10-107.

Coker testified that over a span of a couple of months he was in Donald Clark's grow room three or four times. R 10-110, 111. Coker observed six people in the grow room other than Clark. Those persons told him they were doing the same thing in the room that he was, which was to take some of the plants. R 10-112. Coker did not testify what arrangements, if any, these people had with Clark, though he did indicate that a person named Aldridge told him that Aldridge had a deal with Donald Clark much the same as Coker's deal with Clark. R 10-121.

The next government witness was Timothy Young. Young's testimony about Mr. Clark was quite limited. Young testified that in 1985 Hendry told him about the seedling deal that Hendry had with Clark. Hendry took Young to the grow room, though Young did not see anything growing. To Young's knowledge Hendry never got the seedlings.

R 10-155. On direct examination the government asked Mr. Young, who was named as a co-conspirator, what he had plead to in this case. Young replied that he had plead to "[c]onspiracy to cultivate marijuana." R 10-166.

Government witness Gary Huffman provided no direct testimony about Donald Clark. Huffman testified generally that if someone had a good idea about growing marijuana it would be shared. R 11-30. Huffman did not testify that Clark was involved in this sharing of information. Additionally, Huffman testified, in response to a hypothetical question, that if he or another grower saw law enforcement in someone's field they would let that person know they needed to be careful. R 11-45. Again, Huffman did not relate Donald Clark to this activity.

Huffman testified that each time he joined with a person to grow marijuana it was a separate business transaction. R 11-90. Huffman testified that there was no common plan and that your business was just between "you and your partner". Over the years through general talk, growers became aware of what the other growers were doing. R 11-90, 91, 92. It was common knowledge who had marijuana fields, but they were not in business together. R 11-111, 112, 113.

Next to testify was Raymond King. King had no testimony concerning Mr. Clark. He testified that in 1987, the year that Donald Clark was arrested for the violation of his 1985 probation and two new charges, he went to the grow room with Duane Clark and that Donald Clark was not present. R 11-129, 130.

Also testifying was Rob Whaley. Mr. Whaley's only testimony concerning Mr. Clark was that in 1980 or 1981 he smoked marijuana with Clark on about 15 occasions. R 11-134, 155. Whaley also saw Duane and Gary Clark smoke marijuana with their father during that time. R 11-158. Other persons were present. R 11-160.

Brian Coker, brother to Phil Coker, testified that he had never done any business with Donald Clark, R 12-31, 32, 33. In the early 1980's he saw marijuana on the farm when he was with Clark's sons. R 12-66. Brian

Coker also testified that at one time he had a conversation with Mr. Clark in which Donald Clark stated that there was a lot of money to be made in the marijuana business. R 12-87.

Also admitted into evidence was a map Deputy Livingston designed which showed marijuana fields he visited during his investigation. R 5-149, GE 177. The map had on it yellow, green and red/green dots. R 5-149. The single yellow dot indicated the marijuana field discovered on the Appellant's farm in 1985. R 5-150. Green dots indicated marijuana fields that Livingston had eradicated. R 5-150. The red/green dots indicated all the fields shown to him by Bruce Hendry and Gary Huffman. R 5-150. Deputy Livingston indicated that every field he had ever been personally involved with was represented on GE 177 by a green dot. R 6-136.

On cross-examination Deputy Livingston testified he had discussed on direct testimony thirty or forty marijuana fields. R 7-5, R 5-152 through 168. Approximately half of the marijuana fields designated on GE 177 and testified about were not related to Mr. Clark to Livingston's knowledge. Several of the fields had nothing to do with the conspiracy alleged in the indictment. R 7-6. The defense moved for a mistrial based on intentional prosecutorial misconduct for eliciting testimony about marijuana fields not related to the Appellant. R 7-7.

The government represented that "most of those fields do relate to the conspiracy". R 7-8. The government represented that it would link these fields to the conspiracy through Deputy Livingston or through other witnesses. The motion for mistrial was denied subject to being renewed at the appropriate time. R 7-8.

At sentencing the Defendant specifically objected to the calculations contained in the PSR relative to Mr. Clark's relevant conduct. The Court stated that it, "adopts the factual statements contained in the pre-sentence report, as to which there is no objection and as to the controverted factual statements, the Court adopts the position of Probation as stated in the addendum." (R18-31).

In the argument at sentencing on the relevant conduct point which is the subject of this Petition, the Government made the following statement to show why it believed that Mr. Clark should be held responsible for the entire output of the conspiracy:

> Mr. Page: Yes, Your Honor. The Government feels that paragraph fifty-eight is bottomed in the facts which came out on the trial, specifically the testimony came from Lieutenant John Potts in his estimation was that this conspiracy charged in count one, the only count that went to trial, involved in his estimations and in his expert opinion approximately one million marijuana plants. Under the guidelines, it's 1B1.3, page 1.16 of the guideline manual, the test for whether we can include that number of plants in determining the Defendant's applicable range is in the case of criminal activity undertaken in concert with others. Whether or not charged as a conspiracy, the conduct for which the Defendant would be otherwise accountable also includes conduct of others in furtherance of execution of jointly undertaken criminal activity that was reasonably foreseeable by the Defendant.
>
> And so it's a two prong test. Number one, were the actions of Mr. Clark's co-conspirators in furtherance of the conspiracy, and number two, did Mr. Clark know what they were doing or would he, could he be found to have reasonably foreseen about the activities and marijuana cultivation and growing that his co-conspirators were undertaking. And so, really in looking at this issue, our position is made evident in number fifty- eight, should the Defendant be responsible for all the drug transactions he was aware of, and number two, that he should have reasonably foreseen.
>
> I'd like to break that down into two parts, number one, of what he was specifically aware of. And it was clear from the trial

testimony that he was involved in nine hundred marijuana plants, the number approximate number that were seized in 1985. It was clear from the trial testimony that Phil Coker and he combined and confederated and conspired together in growing a marijuana field. It was clear from the trial testimony that Bruce Hendry sold marijuana on behalf of Donald Clark. It was clear from the trial testimony that there were a number of seedlings grown in the grow room with Mr. Bruce Hendry and others. And it was clear from the debriefings that were conducted after the trial of several individuals that Donnie Clark supplied Sammy Boyett, Richard Copeland and from the trial testimony Mr. Whaley and others, and the Government's evidence at trial which consisted of the notebook detailing his individual sales, and so that category is well established that Mr. Clark was well aware of, from his own personal dealings, a number of activities of his co-conspirators.

The next category under 1B1.3 is if he wasn't aware of some of these, then what can be attributed to him because he should have reasonably foreseen what his other growers, other members of the conspiracy were engaged in. And in that regard, the Court is aware because the Court took the pleas of Duane and Gary Clark, his sons, and the trial testimony revealed that he taught them how to grow marijuana, coached them. And the Court is aware of the trial testimony of Bruce Hendry who testified that Donnie Clark advised him on how to grow, told him about potash and fertilizer and weed killer and things like that. And he even discussed floaters with him. And so it's not unreasonable to attribute the quantities Bruce Hendry and the others grew after Mr. Clark got them started, advised them and counseled them.

Phil Coker was another one that the Court heard from. And Coker testified that he was set up in a field, a field that ultimately

didn't do so well. But there were a number of plants there and what happened to the very pots that Phil Coker used in his operation;

Bruce Hendry took them over and used them. In 1987, the Defendant was arrested on a violation of probation offense and found at the time to be in possession of a small amount of marijuana. The grow room was back in operation after having been destroyed in 1985. And all of these things suggest that he reasonably should have foreseen what others who he had originally got started in with went to do, including Mark Massey.

The debriefing testimony from Mark Massey was to the effect that Donald Clark showed him how to build a drying room. And lo and behold, plans were done made and there was a drying room at Mark Massey's property one of the co-conspirators in count one and a prolific grower in the Manatee County area. So the initial exposure of that the Defendant had was Donald Clark with Bruce Hendry, Brian Coker, and Duane and Gary Clark and those people branched off much like in chain conspiracy. Mr. Clark may not have known specific links in this chain afterwards, but he reasonably should have foreseen what those people who he got started in this activity were going to do. And that conclusion supported by the nature of the beast here, everybody was close associates, they knew what was going on in the area, and we just don't feel it's unreasonable attribution to put the Defendant — burden him with the plants that others grew after he became active in the operation. (R. 18-6-10).

The Trial Court denied the Defendant's objection to paragraph fifty-eight, which involved Mr. Clark's relevant conduct, and held the Defendant responsible for one million marijuana plants which was the estimated output of marijuana for the entire conspiracy spanning ten years.

On Appeal, the Defendant's arguments focused more on the issue of prosecutorial misconduct and the admissibility of evidence, due to the fact that the Ismond decision had not been decided until after the briefs in this case had been filed. The Defendant did make a relevant conduct argument on appeal and argued that he should not have been attributed the total conspiratorial output of marijuana for sentencing purposes. This issue was not addressed in the unpublished opinion written by the Eleventh Circuit.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit Court of Appeals, as well as other Circuit Courts of Appeal, have determined that for sentencing purposes, a member of a drug conspiracy is liable for his own acts and the acts of others in furtherance of the activity that the defendant agreed to undertake and that are reasonably foreseeable in connection with that activity. Thus to determine a defendant's liability for the acts of others, the district court must first make individualized findings concerning the scope of criminal activity undertaken by the particular defendant. Despite the Eleventh Circuit's holding in Ismond, requiring district court judges to make specific findings of fact in drug conspiracy cases, the Court affirmed Mr. Clark's sentence of life imprisonment without making individualized findings. From the evidence at trial, it was clear that Mr. Clark was directly involved in only a minute portion of the alleged one million marijuana plants produced by the conspiracy. This decision was contrary to decisions in the Eleventh Circuit as well as decisions in other circuits and therefore this Courts intervention is required.

Since the sentencing of Donald Clark on November 4, 1991, the

11th Circuit has decided several cases which require certain steps to be followed in applying the Federal Sentencing Guidelines to cases involving drug conspiracies. The purpose of the steps is to insure that a conspirator is not held liable for the conspiracy's entire output of drugs when in actuality the conspirator should only be held responsible for a quantity less than all. United States v. Ismond, 993 F.2d 1498, 1499 (11th Cir. 1993) In Ismond, the United States Court of Appeals for the 11th Circuit outlined the necessary steps to sentencing a member of a drug conspiracy:

> "For sentencing purposes a member of a drug conspiracy is liable for his own acts and the acts of others in furtherance of the activity that the defendant agreed to undertake and that are reasonably foreseeable in connection with that activity. Thus to determine a defendant's liability for the acts of others, **the district court must** first make individualized findings concerning the scope of criminal activity undertaken by a particular defendant. Once the extent of the defendant's participation in the conspiracy is established, the court can determine the drug quantities reasonably foreseeable in connection with that level of participation. If the court does not make individualized findings, the sentence may nevertheless be upheld if the record supports the amount of drugs attributed to a defendant. The government must establish the quantity of drugs by the preponderance of the evidence. Id. at 1499.

Following the reasoning of the 11th Circuit in Ismond, the determination of the scope of the agreement to undertake criminal activity is very important because it is the first step in the sentencing analysis and is the key factor used in establishing the quantity of drugs reasonably foreseeable by the defendant. A factual finding well grounded in the facts of

the trial record is crucial to providing a foundation upon which to begin the sentencing analysis. This necessary foundation helps insure that the conclusion of the analysis will result in justice; that is a sentence firmly supported by the evidence and specifically tailored to fit the crime.

The Federal Sentencing Guidelines recognize that because "a count can be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity undertaken by the criminal defendant is not necessarily the same as the scope of the entire conspiracy." U.S.S.G., § 1B1.3, Application Note 2(ii). The sentencing court should define the scope of Donald Clark's agreement to undertake criminal activity in both numbers of co-conspirators and numbers of years. More importantly the factual finding must be well supported by the evidence. The sentencing court may not speculate as to the extent of Donald Clark's involvement in the conspiracy because the government must establish the scope of his agreement by a preponderance of the evidence. United States v. Adams, 1 F.3d 1566, 1581 (11th Cir. 1993)

During Donald Clark's sentencing hearing, the District Court adopted the pre-sentencing report (hereinafter "PSR", App. A) as an accurate statement of the facts in his case and used those facts in determining a sentence. (App. A-31) The PSR describes Donald Clark as vertically integrated into the conspiracy and as having a role greater than that of a "minimal participant." (App. B, Paragraph 61) The PSR did not define the scope of his agreement in the conspiracy in numbers of co-conspirators or exact periods of involvement. It just simply attributed the drug output of the entire conspiracy to him, as if he had made an agreement with all 27 of his co-conspirators and had been active for the entire 10 year period of the conspiracy with all of the separate growers. As well as attributing to Donald Clark the entire one million plants of marijuana estimated to be involved in the conspiracy, the PSR also stated the following about his involvement: "Donald Clark did not organize, manage, or supervise any criminal activity. (App. B, paragraph 61) The apparent contradiction between the PSR's findings and its conclusions highlight the need

for the district judge to make specific findings of fact supported by evidence from the trial to the extent that the Trial Court could have made a finding by a preponderance of the evidence.

The sentencing hearing is one of the most important phases of any criminal proceeding. Even though the Federal Sentencing Guidelines has limited the discretion of the judiciary in its ability to specifically tailor sentences to fit the circumstances of particular crimes, district court judges still maintain a wide degree of latitude in sentencing. The 11th Circuit has recently recognized that it is critical for district court judges to take an active role in implementing the Guidelines. Sentencing is too important to be left to the recommendations of probation officers alone. It is the experience and knowledge of the judges that is needed to determine whether the Government has met its burden and proved its case by a preponderance of the evidence. Furthermore, the judges are needed to make sure the punishment fits the crime and to make sure all sentences are firmly supported by the trial record. It may be these recent realizations by the 11th Circuit that are responsible for two cases that were remanded for re-sentencing because the court adopted the PSR (or PSI) instead of taking an active role in making the specific, individual factual findings outlined in Ismond.

In United States v. Beasley, 2 F.3d 1551 (11th Cir. 1993), the 11th Circuit noted that the district court adopted the PSI without making any specific findings as to the quantity of drugs attributable to the defendant. In United States v. Chitty, 15 F.3d 159 (11th Cir. 1994), the district court accepted the PSI as controlling. The 11th Circuit determined that the PSI failed to include evidence of how the defendant knew of past operations, or the identity of all the conspirators, or the origin of all the marijuana, or how it was imported, or how it was moved, or what future operations were contemplated, or in what quantities and by whom. Id. at 162. The decision in Chitty is a good example of the specificity required in setting forth the factual basis for sentencing.

In Donald Clark's case, the PSR lacked specificity in much the

same ways as the above cases. It failed to make the most basic inquiries into the conspiratorial agreements of Donald Clark. It did not determine the individuals with whom Mr. Clark was in agreement. It failed to specifically state time periods Mr. Clark was active in the conspiracy. It failed to break down individual responsibility for the numerous marijuana fields. Lastly, it arrived at a total quantity of marijuana based upon an estimate given by an officer involved in only a portion of the case. The Court further relied upon a blanket statement in the PSR which stated that the quantity was confirmed by debriefings of Co-defendants who plead guilty to the conspiracy.

At the same time the PSR ignored trial testimony of other officers who broke down the quantities, by field and grower and whose total figures, although not specifically stated, would have been substantially less. Although mentioning debriefings, and presumably having that information available, the probation office gave no indication whatsoever, of who or how the one million plant figure was arrived at from the debriefings and it certainly made no assessment of what part Donald Clark was responsible for. The PSR did identify certain large crops by year, location and individuals who were responsible for them. (App. B-7,8, Paragraphs 36-46). Donald Clark was not related to these crops in any manner and the PSR does not list him as a responsible individual.

The Probation Office also failed to recognized facts which were present and compiled in it's own report relative to Donald Clark's role. Specifically, with respect to the fact that there were 28 individuals charged in a thirty-nine count indictment. Mr. Clark was only charged in Count one which was the conspiracy count. The other counts were, for the most part, possession counts which charged the individuals responsible for specific marijuana fields. Paragraphs 36-46 (App. B-7,8) of the PSR lists the most significant marijuana fields in the conspiracy and the time they were grown and the individuals involved. Donald Clark is not listed as responsible for any of them. Due to the Trial Courts failure to make specific, individualized findings concerning the scope of Mr. Clark's

criminal activity, and its erroneous adoption of a PSR, it is necessary for this Court to exercise its jurisdiction and correct an improper sentence of life imprisonment. As in Beasley and Chitty, we ask this Court to correct the sentence of Donald Clark by remanding this case to the Trial Court with directions to make specific factual findings as to the scope of his agreement in the conspiracy, and factual findings regarding the quantity of drugs produced by his co-conspirators which were reasonably foreseeable in connection with his agreement.

The Ismond case, enhances the United States Sentencing Guidelines § 1B1.3(a)(1)(B) in that before holding a defendant responsible for the acts of others Ismond requires that, "the district court make individualized findings concerning the scope of criminal activity undertaken by a particular defendant." Ismond, at 1499. Since Mr. Clark was only charged with a conspiracy, it is imperative, in accessing the scope of his criminal activity, to determine the basic factual findings regarding his agreement. These basic factual findings would include who Mr. Clark made agreements with, for what criminal activities, and during what time period. Once it is determined what criminal activity Mr. Clark agreed to undertake, then the trial court must access what actions of others were reasonably foreseeable to him.

The bottom of the last paragraph of the governments argument to the judge regarding the relevant conduct objection at sentencing crystalizes the flaw in the Government's, and presumably the Trial Court's, thinking regarding holding Mr. Clark responsible for the entire output of the conspiracy. The Assistant U.S. Attorney stated:

> Mr. Clark may not have known specific links in this chain afterwards, but he reasonably should have foreseen what those people who he got started in this activity were going to do. And that conclusion supported by the nature of the beast here, everybody was close associates, they knew what was going on in the area, and we just don't feel it's

unreasonable attribution to put the Defendant — burden him with the plants that others grew after he became active in the operation. (App. A-10).

The Government's argument starts with a look at the entire conspiracy and then works backward to Donald Clark. This type of analysis will automatically result in attributing the entire output of the conspiracy to the Defendant. This backwards approach results in a sentence that disproportionately represents the Defendant's conduct and unfairly punishes him for the acts of others. In order to avoid this type of result, the 11th Circuit in Ismond set forth a sentencing approach which is directly contrary to the approach taken by the Government in Donald Clark's case.

The Ismond analysis begins with the defendant's agreements with other conspirators. These agreements form the basis for determining the extent of the Defendant's involvement in the conspiracy. The extent of the Defendant's involvement forms the basis for determining what production of others is reasonably foreseeable and can be attributed to him for sentencing purposes. This analysis yields a quantity of drugs which holds the defendant accountable for his actions and those reasonably foreseeable to him as a result of his conduct. At the same time it recognizes the problems inherent in sentencing a member of a large, nebulous conspiracy involving numerous people over a long period of time. This also affords the trial court an opportunity to tailor a sentence which accurately reflects the extent of the individual defendant's criminal activity.

For the above stated reasons, the Court should have determined that Mr. Clark was not responsible for the entire output of his co-conspirators. Individualized findings as to the scope of the criminal activity undertaken by Mr. Clark would have resulted in a sentence of several years as opposed to life imprisonment. It is uncontroverted that Mr. Clark was only directly responsible for a very small amount of the one million marijuana plants actually attributed to him for sentencing purposes. The Government and the Court believed that the actions of the others were reasonably foreseeable to Mr. Clark. However, the Government and the

Trial Court did not make the specific factual findings necessary to support a sentence of life imprisonment.

CONCLUSION

In it's decision in United States v. Ismond, 993 F.2d 1498, The United States Court of Appeals has recently corrected or clarified a wrong which has existed for many years. The obvious intent was to insure fair sentencing by the Court for individuals charged in drug conspiracies. This analysis avoids the potential for a defendant to be held responsible for the acts of others which were not reasonably foreseeable to him, and allows the trial court to tailor a sentence to accurately reflect an individuals criminal conduct. The case of U.S. v. Donald Clark, was exactly such a case where the reasoning of Ismond should have been applied. In sentencing a defendant for a conspiracy which spans ten years, and involves twenty-eight co-conspirators, justice requires extra precautions to insure that the punishment fits the crime. The Eleventh Circuit set out these extra precautions in Ismond, and then failed to follow them by affirming Donald Clark's sentence. This injustice has resulted in a man being sentenced to life imprisonment for the acts of others which no reasonable man could have foreseen.

Accordingly, the Petitioner respectfully requests this Court to grant the Petition for Writ of Certiorari and to require briefs on the merits and oral argument of this cause.

Respectfully submitted,

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APPENDIX

Exhibit A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,	90-175-CR-T-17
Plaintiff,	Tampa, Florida
versus	November 4, 1991
DONALD CLARK,	9:30 a.m.
Defendant.	

VOLUME XVI
SENTENCING PROCEEDINGS
BEFORE THE HONORABLE ELIZABETH A. KOVACHEVICH

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PROCEEDINGS

November 4, 1991

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*THE COURT: All right, let's come forward on the Clark case. All right, Ladies and Gentlemen, this is case number 90-175-Cr-T-17, United States of America represented by Assistant United States Attorney Walter Terry Furr and Edward Page. And the Defendant is present represented by his attorneys Tom Ostrander and Lane Vaughn and the Defendant is present.

Donald Clark, on June 21, 1991, you were found guilty by a Jury and were-adjudged guilty of count one of the Indictment charging you with conspiracy to manufacture, distribute and possess with intent to manufacture and distribute one thousand or more marijuana plants in violation of 21, United States Code, Section 846. It's the duty of the Court to address several questions. First of all, Mr. Clark, have you had an opportunity to read and discuss the pre-sentence report with your attorneys

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. Mr. Vaughn, Mr. Ostrander, did you go over it with your client?

MR. OSTRANDER: Yes, Your Honor.

THE COURT: All right. Mr. Furr and Mr. Page, have you read it?

* Format was altered to conform with United States Supreme Court Rules.

MR. FURR: Yes, ma'am.

MR. PAGE: Yes.

THE COURT: All right. The Court notes in the addendum to the pre-sentence report that there are certain objections, this is with the exception of the objections noted in the addendum to the pre-sentence report. At the present time, are there any other objections as to the factual accuracy of the report or as to the application of the guidelines by the probation officer, Mr. Ostrander?

MR. OSTRANDER: Yes, Your Honor. One last objection I'd like to note for the record is I want to object to the application of the 2D.1.1A of the sentencing guidelines which calls for a measurement for quantities when the number of marijuana plants exceeds fifty-one. We believe that the calculation since it was a large calculation resulted in the increase of from one hundred grams per plant to I believe it's two kilos per plant and where we're objecting is strictly a legal argument.

I don't think there's anything much we can accomplish at this point in time. I'm objecting to that application, it's clearly part of the calculation under this guideline.

THE COURT: What paragraph in particular?

MR. OSTRANDER: Paragraph fifty-six.

THE COURT:-Paragraph fifty-six, I have to circle that, sir. All right. Now, that is the only other objection, is that correct?

MR. OSTRANDER: That's correct, Your Honor.

THE COURT: At the present time, does the Government have any other objections at the present time?

MR. FURR: No, ma'am.

THE COURT: All right. Now, I'm going to note the fifty-six is to be added here. And you've really just made your argument with regard to fifty-six, correct?

MR. OSTRANDER: That's correct.

THE COURT: What's the Government's response to paragraph fifty-six and the argument they've just made.

MR. FURR: I'll do it. It's the law. The law says that if you're dealing with more than fifty marijuana plants, treat each plant as equivalent to one kilogram of marijuana. I think that's clearly stated in the guidelines in a note at the end of the quantity scales under 2Dl.l and my guidelines, it's at page 2.47. And I can quote in the case of an offense involving marijuana plants, if the offense involved paren close paren fifty or more marijuana plants, treat each plant as equivalent to one kilogram of marijuana. That's what we have here, that's the law, whether he likes it or not.

THE COURT: What's your rebuttal?

MR. OSTRANDER: Judge, we're just simply arguing that's an unconstitutional application of the guidelines and it's a violation of protection. It's clearly in the sentencing guideline.

THE COURT: It certainly is, equal protection.

MR. OSTRANDER: I don't have any cases that are on point.

MR. FURR: Judge, the Eleventh Circuit dealt with it on a case, Bradley, 905 Fed. 2nd 359. I believe it was a case involving a sentencing before Judge Krentzman. The objection there essentially was that — the quantities weren't as great as they were here. The argument was essentially the same, that is, the assigning of a particular weight to the plants based on number. And in the case of Bradley, rather than the actual weight of the plants themselves, the Court found it was —that was the law.

THE COURT: Okay. What is your rebuttal, if any?

MR. OSTRANDER: None, Your Honor.

THE COURT: Well, it is the law. The Defendant's objection with regard to that is overruled. Now, let's get into the body, in the addendum, paragraph fifty-eight. What argument do you want to make on that?

MR. OSTRANDER: Judge, I believe the initial argument that

I made was as to the calculation of the plants strictly on the basis of the evidence that was adduced at trial and through whatever other information it provided to the Office of Parole and Probation. It was my position that the Government cannot, had not proved there were male plants involved in the conspiracy, nor did they prove there were three hundred thousand plants involved in the conspiracy. Of course, we have no access to any debriefings or information that was later provided to the Office of Parole and Probation by the United States Attorneys Office, so I can't speak to that, but I'm advised that some of that information had come through subsequent debriefings. That information has to satisfy the indicia of reliability such as it becomes part of a sentencing to allow you to make that actual alteration, that's why I objected to it. That's part of my argument. I'll go on after we handle that part.

THE COURT: Okay. Mr. Page, are you doing this?

MR. PAGE: Yes, Your Honor. The Government feels that paragraph fifty-eight is bottomed in the facts which came out on the trial, specifically the testimony came from Lieutenant John Potts in his estimation was that this conspiracy charged in count one, the only count that went to trial, involved in his estimations and in his expert opinion approximately one million marijuana plants. Under the guidelines, it's 1B1.3, page 1.16 of the guideline manual, the test for whether we can include that number of plants in determining the Defendant's applicable range is in the case of criminal activity undertaken in concert with others. Whether or not charged as a conspiracy, the conduct for which the Defendant would be otherwise accountable also includes conduct of others in furtherance of execution of jointly undertaken criminal activity that was reasonably foreseeable by the Defendant.

And so it's a two prong test. Number one, were the actions of Mr. Clark's co-conspirators in furtherance of the conspiracy, and

number two, did Mr. Clark know what they were doing or would he, could he be found to have reasonably foreseen about the activities and marijuana cultivation and growing that his co-conspirators were undertaking. And so, really in looking at this issue, our position is made evident in number fifty-eight, should the Defendant be responsible for all the drug transactions he was aware of, and number two, that he should have been reasonably foreseen.

I'd like to break that down into two parts, number one, of what he was specifically aware of. And it was clear from the trial testimony that he was involved in nine hundred marijuana plants, the number, approximate number that were seized in 1985. It was clear from the trial testimony that Phil Coker and he combined and confederated and conspired together in growing a marijuana field. It was clear from the trial testimony that Bruce Hendry sold marijuana on behalf of Donald Clark. It was clear from the trial testimony that there were a number of seedlings grown in the grow room with Mr. Bruce Hendry and others. And it was clear from the debriefings that were conducted after the trial of several individuals that Donnie Clark supplied Sammy Boyett, Richard Copeland and from the trial testimony Mr. Whaley and others, and the Government's evidence at trial which consisted of the notebook detailing his individual sales, and so that category is well established that Mr. Clark was well aware of, from his own personal dealings, a number of activities of his co-conspirators.

The next category under lBl.3 is if he wasn't aware of some of these, then what can be attributed to him because he should have reasonably foreseen what his other growers, other members of the conspiracy were engaged in. And in that regard, the Court is aware because the Court took the pleas of Duane and Gary Clark, his sons, and the trial testimony revealed that he taught them how to grow marijuana, coached them. And the Court is aware of the trial

testimony of Bruce Hendry who testified that Donnie Clark advised him on how to grow, told him about potash and fertilizer and weed killer and things like that. And he even discussed floaters with him. And so it's not unreasonable to attribute the quantities Bruce Hendry and the others grew after Mr. Clark got them started, advised and counseled them.

Phil Coker was another one that the court heard from. And Coker testified that he was set up in a field, a field that ultimately didn't do so well. But there were a number of plants there and what happened to the very pots that Phil Coker used in his operation; Bruce Hendry took them over and used them. In 1987, the Defendant was arrested on a violation of probation offense and found at the time to be in possession of a small amount of marijuana. The grow room was back in operation after having been destroyed in 1985. And all of these things suggest that he reasonably should have foreseen what others who he had originally got started in with went on to do, including Mark Massey.

The debriefing testimony from Mark Massey was to the effect that Donald Clark showed him how to build a drying room. And lo and behold, plans were done made and there was a drying room at Mark Massey's property one of the co-conspirators in count one and a prolific grower in the Manatee County area. So the initial exposure that the Defendant had was Donald Clark with Bruce Hendry, Brian Coker, and Duane and Gary Clark and those people branched off much like in a chain conspiracy. Mr. Clark may not have known specific links in this chain afterwards, but he reasonably should have foreseen what those people who he got started in this activity were going to do. And that conclusion supported by the nature of the beast here, everybody was close associates, they knew what was going on in the area, and we just don't feel it's an unreasonable attribution to put the Defendant — burden him with the

plants that others grew after he became active in the operation.

THE COURT: Okay. Anything you want to say in rebuttal?

MR. OSTRANDER: Yes, Judge. 1B1.3, is the Parole and Probation which I first submitted my objections. I objected specifically to the discussion of reasonableness and I notice that it really wasn't spoken to in this addendum, but I'd like to pursue that.

In this particular case, Donald Clark pled guilty in 1985 to the possession of nine hundred plants and that's what we think should be attributed to him is the nine hundred plants. Mr. Page just talked about Phillip Coker growing some plants and Hendry growing some plants, but the numbers to substantiate the million or the three hundred thousand are not there. Everybody talks about some plants and the only evidence that the Government is willing to rely upon today is the fact that Lieutenant Potts took the stand and said that he believed the scope of the operation was between nine hundred and a million, whatever, just not to misquote Mr. Page, but the statement he just made, but there was no solid evidence or no evidence with the indicia of liability to allow the Court to determine there was a million plants or three hundred million, but anyway, nevertheless, it's important to point out that the defense's position is that there was no proof to establish that that many plants had ever been grown. Getting back to the actual application of 1BI.3 which allows us to determine whether it was foreseeable for Donald Clark to — whether he could reasonably have foreseen that the conduct of his co-conspirators would encompass all these plants, every witness that took the stand from Phillip Coker to Bruce Hendry to Huffman, all testified that everything was a secret, they kept their plots secret, they kept their conspiracy secret. Nobody knew what anybody else was doing when Donald Clark pled guilty and accepted responsibility for his actions in 1985. There was no proof whatsoever subsequent to that that he was involved with any of these

people in any way. Mr. Page said that when the police went back there in 1985, a subterfuge, they doesn't get a search warrant, they got in and found a grow room, but they didn't find any growing seeds, plants, planters, buckets. All the things that they purged during the first visit, none of that stuff was present at the present time despite the fact they want to take the position that this is part of the ongoing conspiracy.

There were no more plants. There was a small amount of personal use marijuana present on the property at that point in time. The only pot or marijuana that should be attributed to Donald Clark is that nine hundred plants that he was caught with, pled guilty to in 1985. That was the total extent of his effort in the conspiracy. Some information has just been given to this Court, though, that they received from debriefings that I've never heard before and this is exactly the testimony that I'm saying should not be given the indicia of reliability, such as, you should rely upon it to establish this information is factual that these are findings of fact that you must make at this time. If you attribute to Donald Clark his failed effort with Phillip Coker, we would concede the point, but beyond that, there is not the testimony to establish that Donald Clark would have seen that there would be this many conspiracies, not one conspiracy, but many conspiracies. Every one of these individuals was involved in to their own benefit, not to the benefit of Donald Clark. The cases say there had to be a conspiracy, that he agreed to that part of his agreement, that he willfully joined. There is no testimony he willfully entered into anything. The testimony was he was indicted in 1985 with nine hundred plants, involved with Phillip Coker, that was it. The argument that Mr. Page is making that Bruce Hendry then took the offending buckets and went on further and grew more pot, it's a stretch of the imagination to argue that would be foreseeable to Donald Clark and as such he should be attributed

with the full fruits of this conspiracy.

THE COURT: Okay.

MR. VAUGHN: Can I add one thing?

THE COURT: Well, really only one attorney is supposed to make the argument, Mr. Vaughn, but go ahead.

MR. VAUGHN: Your Honor the Government's own witness testified that after 1985 that Donald Clark verbally informed them that he had nothing more to do with the marijuana business and I believe the testimony was he would not even allow them back on the ranch. There was no further testimony by any Government witness that Donald Clark participated in anything after 1985. The only testimony the Government provided was that Mr. Clark verbally withdrew from the conspiracy after his conviction in 1985. There was no further testimony since 1985 implicating Mr. Clark.

Like I said, only to the contrary, I believe there was at least two or three witnesses by the Government who testified that Donald Clark stated to them at that time unequivocally he was no longer going to have anything to do with the marijuana business. No testimony after that to show his involvement in anything.

THE COURT: Okay. Court's going to defer on that temporarily. Go on to paragraph fifty-nine. It is the firearms.

MR. OSTRANDER: Judge, I filed an objection under the application of the firearms for Donald Clark such as to raise the base offense level by two degrees. The initial objection that I made was based on the fact that Parole and Probation had determined that the violation of probation in 1985 was part of this conspiracy. And my main objection there was a factual one, there was no testimony at any time that this was part of any conspiracy, that in fact, Donald Clark was arrested in his home with a small quantity of marijuana to which he also pled guilty and did a State sentence. At the time, they discovered sixteen weapons on the premises and I believe the

argument was made that because the weapons were present, that this was part of the conspiracy. My objection is to any determination that this violation of probation and the actions that were a part of that violation were any sort of this conspiracy, whatsoever, such that the weapons should not be attributed to Donald Clark through the conspiracy.

The Government has objected and has taken the notion that any use of any weapon by any co-conspirators would raise his base offense level by two degrees or two levels, I'm sorry, and my objection is based on the fact that subsequent to the 1985 activity, Donald Clark was no longer a part of that conspiracy.

THE COURT: What is your response?

MR. FURR: Judge, first of all, I believe the Defendant utilized a withdrawal defense, defense or argument, which the Court was persuaded to at least let the Jury take a look at that. I believe there was an instruction to that effect. The Jury didn't go with that. Secondly, as to the firearms, purely and simply, I think there's two arguments that apply here. First is the Defendant's possession of a firearm during the commission of the conspiracy here which went on for a number of years. The 1987 violation of probation arrest at his home was accompanied by, one, the finding of some marijuana in the house, and two, the finding of several firearms in the house and I believe a Tech nine which was loaded in his barn in the vicinity of where the grow room was. And you will also recall that was in '87. We had a witness named, I believe, Raymond King, who was at the ranch in '87, he was a tall, thin, dark haired guy. Judge, I know it's tough to remember him, but Mr. King testified he was at the ranch in '87 and the grow room was being utilized at the time, and keep in mind, the grow room was about one hundred feet from his door, now, secondly, so I think he gets attributed to the firearms for the fact that he possessed them during the commission

of the offense. And by and in itself, that is enough for the enhancement to be appropriate.

Our second argument would come under the language of the Otero case which is at 890 Fed. 2nd 366, which was an affirmance by the Eleventh Circuit of a sentence from this particular Court, where a sentence enhancement is proper for a co-conspirator's possession of a firearm, that one, the possessor was charged as a co-conspirator. Let's look at the possessor here as being Hendry and Huffman, make it nice and simple. They were charged with — they were found with a gun in Glades County, when they were arrested, they were charged. Two, co-conspirators found to possess firearms in the furtherance of the conspiracy. They certainly did and they testified to that effect. Three, the Defendant was a member of the conspiracy at the time of the firearms possession. He never withdrew really. This is the Defendant, never withdrew legally, number one. Number two, the Jury didn't buy any withdrawal defense either. He gets the firearms. If there was anything these witnesses were unanimous about, it was that everybody that participated in this conspiracy utilized firearms. They utilized firearms because they spent a lot of time outside. They spent a lot of time in the woods. And when they were out there, they doubled between poaching and looking for other places to grow or as in the case of when Hendry and Huffman were arrested, they are out poaching and going by and checking on their crop that was in the field at the same time. So they all used firearms. These were attributed to this Defendant as well. So either possessed them or his co-conspirators possessed them, one or the other.

THE COURT: All right. Anything in rebuttal?

MR. OSTRANDER: Yes, Your Honor. Otero also calls for the foreseeability standard that it was reasonably foreseeable to the Defendant that the weapons would be used in the furtherance

of the conspiracy. Though I agree there was substantial testimony about the fact that these were all back-woodsmen, all country guys, all hunted and poached and did all that other sort of stuff, the testimony is just equally substantial they were using the weapons for poaching which I wouldn't suggest is in furtherance of this conspiracy, any conspiracy, unless they're conspiring to poach. But my strongest argument, Judge, under Otero, it is not reasonably foreseeable that Donald Clark who after 1985 had nothing do with this conspiracy, that any weapons would be used in furtherance of any conspiracy.

Again, I can only go back to the testimony of every witness, that every one of these conspiracies was secret, was clandestine. They kept everything from each other. Sometimes they interwove their conspiracy, but still kept their sites secret, their plants secret, everything else secret.

Judge, I would also point out that that Raymond King that Mr. Furr alluded to testified as did Tim Young that under their visits to Donald Clark's farm subsequent to 1985 that they visited a grow room, not with Donald clock, not under the control of Donald Clark, but with Duane Clark and others. There was no evidence that Donald Clark was living at the farm, there was testimony that Donald Clark was working on other various ranches during various periods of time which have been considered to be part of that conspiracy.

THE COURT: Okay. I'll reserve on that next paragraph. I think we're up to —

MR. OSTRANDER: Sixty-one.

THE COURT: Sixty-one, yeah.

MR. OSTRANDER: All right. Judge, I objected to the Parole and Probation's evaluation of the role played by Mr. Clark in this conspiracy, though they did not consider him a highly culpable

Defendant, they did not consider him a minimal participant. Under the circumstances of this case, especially the light of scope as drawn by the United States Attorneys Office, the Government, of a million plants. Mr. Clark's involvement was minimal such that I believe he should be entitled to a reduction under the sentencing guidelines. Mr. Clark's evidence was that he was involved to the extent of his nine hundred plants, that there was some testimony of Phillip Coker that he helped him, set up his plants which ultimately failed. That's the extent of the testimony involving Donald Clark. As a result of that, I'm taking the position he is a minimal participant, especially in light of other Defendants in this case, and as such, should be given a three level reduction for the fact that he was a minimal participant.

THE COURT: Okay, response.

MR. FURR: Judge, they're going for four points off to the minimal?

THE COURT: Yes, sir, four points.

MR. FURR: According to my reading of the guidelines, that generally goes to a person's lack of knowledge, not only the scope, but also the activities of others. \If you review the guidelines, they say that, one, that should be used infrequently and when you look, I believe it's 3B1.2, it indicates that basically that would be used if you had a single incident participant with a menial-type role. I believe they use the indication of a person who might be a courier on one occasion or might participate and offload a boat on one occasion or something like that.

Let's look at what Mr. Clark was. One, he was a big time grower in his own right. He taught others to grow. The evidence of that was from Mr. Phil Coker and Bruce Hendry. He was there over the years for Bruce Hendry, taught him how to use root tone. I was going through my notes this morning; root tone, seal-a-meal bags,

how to pollinate plants. Additionally, was there when a growing site to grow the seedlings was needed by Hendry and Timmy Clark. And he lent his grow room for that to them. All this with a mind towards distributing these plants later. Additionally, he sold the product of these plants to Bruce Hendry for Bruce Hendry's resale. He's fortunate that we're not asking for points. There's no reason to ask for points under the circumstances. I'm just leveling it at nothing, but it certainly is not a minimal participant and certainly not a minor participant.

THE COURT: Anything you want to say in rebuttal?

MR. OSTRANDER: Yes, Judge. In 1985, they found nine hundred plants on his premises. That was it. Nine hundred plants. After that, there is no record of them picking up anything but a minimum personal use quantity in 1987, yet they paraded their witnesses in here to talk about the hundreds of thousands of dollars that they had hidden in tubes and on their property and the property. The case law said that you're allowed to look at the role of the Defendant within the entire scope of the transaction. One of the things Mr. Furr just said, based on his knowledge of the — and scope of the conspiracy, there was no evidence or testimony whatsoever that Donald Clark knew or understood the scope of this entire transaction. I don't agree there was three hundred thousand or a million plants, but clearly the nine hundred plants that Mr. Clark was involved in in 1985 and I would assume is the determination point for the conspiracy, at least in the mind of the Government, a minimal participant, especially if nothing further occurred from that date forward.

THE COURT: Okay. Reserve on that. Rather defer on that. Next one is sixty-eight. That's on the estimated amount of marijuana on weight.

MR. OSTRANDER: Judge, my recollection from seeing the

original police report and I believe this came in in testimony was that they talked about between a quarter and a half ounce. Now the PSR has shown it —

THE COURT: You mean pound.

MR. OSTRANDER: Quarter and half a pound and I'm just taking that, with that I made that objection, the grander scheme of things. I don't think it's going to change anything as far as the sentence goes, but I wanted to put everything possible on the record as to any objection or inaccuracy.

THE COURT: Where's Probation?

THE PROBATION OFFICER: Here, Your Honor.

THE COURT: You heard the objection that actually the information should be ounces rather than pounds. What's the position of Probation on that point?

THE PROBATION OFFICER: Your Honor, that information was obtained from a Manatee County offense report, that's the only information that we have to go on and I reviewed that report again to make sure it wasn't any other and it reflects it being pounds, Your Honor.

THE COURT: What says the Government on that point?

MR. FURR: I believe this is what the testimony was at trial, but I don't want to swear to it because it was not the highlight of the trial, I don't know.

THE COURT: Well, Probation has taken it from the report. What if any persuasive evidence do you have to the contrary?

MR. OSTRANDER: Judge, only from seeing the Sheriff's report and I looked for it in my own file, I don't have a copy of it available. Again, I was just pointing it out to try to clarify it.

THE COURT: I understand. I can't clarify it if you don't have something to show me that would point out that there is in fact a discrepancy.

MR. OSTRANDER: I understand, I can't dispute that.

THE COURT: Well, Probation has provided a copy of the report, is that correct?

THE PROBATION OFFICER: Yes, Your Honor.

THE COURT: The report shows pounds, correct?

THE PROBATION OFFICER: Yes, Your Honor.

THE COURT: Well, unless you have something else, Mr. Ostrander, I really —

MR. OSTRANDER: I withdraw my objection.

THE COURT: Okay, noted. All right. Next one is one hundred, paragraph one hundred.

MR. OSTRANDER: Judge, I objected to that again from the testimony you have heard at trial. There was no evidence that Donald Clark actually generated income or revenue that he accepted from the growing of marijuana. I know from the pre-sentence investigation meeting with Ms. Lassiter that Mr. Clark clearly established that his sole source of income was farming revenue and that he was a substantial, successful farmer through the '70's and '80's to present and so we simply objected to the characterization that he received part of his income from cultivation of marijuana.

THE COURT: Response from the Government.

MR. FURR: Judge, in 1985, I believe when he was arrested, he spoke with Lieutenant Potts. First of all at that time, there were some books found in his house which he indicated were his and we utilized them at trial. It showed, one, how to grow marijuana on various days within this diary-type book. Different substances being placed on marijuana crops and different location and it talks about that within the book which showed it was a substantial operation, and two, there were in another book, there was a ledger for both Afghan and Sativa-type marijuana with quantities sold to individuals which generated particular amounts of money and it was a

lot of money. I don't know how much it was, but it was in the thousands of dollars that were discussed and that certainly is a significant amount of money.

Additionally, the agent testified at trial, Mr. Potts, that when he arrested Mr. Clark in '85, they talked after the arrest and Mr. Clark indicated to him that he had been surprised or been lucky that he hadn't been caught. He had been growing marijuana for a long time, discussed how he grew it in terms of cutting things down in the swamps, everything else would grow at the same time to make it tougher to spot and that he had made a lot of money doing it and that he made enough to pay for the ranch on a yearly basis by doing that. Whether he utilized the money for that or not, I don't know. But the evidence at trial certainly was he made a lot of money in the marijuana business.

THE COURT: Any rebuttal?

MR. OSTRANDER: Yes, Judge, there was no proof that those books belonged to Donald Clark at the time of the arrest in 1985 in the search. The blanket question was asked of Donald Clark whether the things in the house belonged to him as a blanket statement and he simply referred to the house as yes. Now the Government is coming in and specifically trying to use that statement to show that Donald Clark admitted to owning those books. There is no evidence, no testimony and in fact, to that, Detective Livingston was drilled extensively, extensively to his knowledge of who actually owned the books or if anybody knew whose handwriting it was and no testimony was given, in fact, he said he could not say conclusively it was his books, so the evidence is not conclusive as to that amount.

THE COURT: Anything else?

MR. OSTRANDER: May I have a second, Your Honor?

THE COURT: Yes, you may.

MR. OSTRANDER: Well, I can respond to you, go ahead.

MR. FURR: If I could respond for a moment, Judge, if you recall, the books have virtually everybody else that was associated with this thing in it listed by name. Mr. Clark was not listed in there as one of purchasers ever for any of that marijuana. Secondly, the fact that he had the books, that he had the book on how to grow is just evidence which supports the testimony of other witnesses such as Mr. Hendry who after the arrest in 1985, sold twenty-five or thirty additional pounds of marijuana for Mr. Clark.

MR. VAUGHN: If I may.

THE COURT: Yes, rebuttal.

MR. VAUGHN: Your Honor, even their own witness testified that the books were in two different people's handwriting, so I don't know how they can attribute these books to Donald Clark. Their own witness testified it was two different people who wrote in the two different books. I don't know how they can contend now both those books were Donnie Clark's when their own witness testified there were two different handwritings.

THE COURT: Okay. Is that it on the argument on the objections, Mr. Ostrander?

MR. OSTRANDER: Judge, the only other thing I would ask is that Sergeant Potts or Lieutenant Potts took a statement or at least wrote a statement on a police report during the arrest in 1985 that said that Donald Clark says lease payments with money from drugs.

I don't recall that coming in as testimony and I'm —you know, that him giving that testimony during the scope of the trial. Again, I can only point out that you know the testimony is not and the evidence is not sufficient to allow you to determine that fact, especially based on if the only evidence they have is the books. In fact, they had plenty of witnesses who could have testified if they wanted to as to who those people in the books are, they never did, they just

left it hanging there, it's an unconclusive conclusion that they want the Court to turn into a fact.

THE COURT: Anything else, Mr. Ostrander?

MR. VAUGHN: Can I add one final comment?

THE COURT: Yes.

MR. VAUGHN: As to quantity of plants, I recall the testimony, as you recall, we well objected at the time when the Government put a witness on, they put the charts on and their own witness testified that on cross examination that more than half of the marijuana fields that he testified about and were indicated on those charts not only had, number one, he testified as far as he knew none of the marijuana fields had anything to do with Donald Clark. He also testified that at least half of those marijuana fields had nothing to do with anybody involved in this conspiracy. So when the Government's calculating their amounts, I would like the Judge to recall that testimony.

THE COURT: Okay. Anything else now from the Defendant as to these objections?

MR. VAUGHN: No, Your Honor.

THE COURT: Okay. Anything further from the Government?

MR. FURR: No.

THE COURT: All right. The Court has considered your arguments and the Court has examined these objections and listened to what you have had to say this morning. This Court presided at the trial. The Defendant took the position that he was not guilty at the trial. Various of these items that you have listed, in fact, all of them except the one that you have withdrawn with regard to paragraph Sixty-eight which you concede clearly raised, if not direct evidence, an inference at the time of the trial to substantiate the position that's been taken by the United States Probation Department. This has not been an easy pre-sentence report to prepare. The Court

wants to commend the Probation Department, this has been a very thorough, meticulous accumulation of the facts. The preparation of the inferences that arose based upon the evidence at the trial, inferences upon which the Jury had the right to rely and based upon the Jury's verdict of guilt, the Jury probably did rely and the applicability of the guidelines is just right on in this case. I overrule the objections on paragraph fifty-six, already I think I've said that. Paragraph fifty-eight, Defendant's objection is overruled. Paragraph fifty-nine relative to respectively the plants, the firearms, there's more than enough evidence. Paragraph sixty-one is overruled. It's just absolutely ludicrous to consider the man minimal. The Defendant withdraws paragraph sixty-eight with regard to the issue of pounds based upon the information that's in the Probation Department's file and the Defendant's inability to offer any opposing evidence. Paragraph one hundred. It is certainly clear based upon the evidence with regard to the cultivation of marijuana and income derived therefrom and the book that has been talked about in such great detail, the record-keeping, rather, the fact that it's in more than one handwriting and not established it is Mr. Clark's is immaterial. The evidence was found on his premises, those premises are under his control and responsibility, it's not even a close call with regard to that.

This Court therefore overrules all of the objections of the Defendant and the one that has been withdrawn, the Defendant has withdrawn, therefore the Court adopts the factual statements contained in the pre-sentence report, and as to which there is no objection and as to the controverted factual statement, the Court adopts the position of Probation as stated in the addedum. Therefore, the Court determines that the applicable guidelines are total offense level forty-three, criminal history category Roman Numeral I, life imprisonment, five years supervised release, zero restitution, twen-

ty-five thousand to four million dollars fine, plus cost of imprisonment/supervision, fifty dollars special assessment. Do you know of any reason why the Court should not now proceed with imposition of sentence, Mr. Ostrander?

MR. OSTRANDER: No.

THE COURT: Mr. Furr?

MR. FURR: No, ma'am.

THE COURT: Do you wish to make a statement or present any information in mitigation of sentence, Mr. Ostrander?

MR. OSTRANDER: Yes, Your Honor.

THE COURT: Go ahead.

MR. OSTRANDER: Judge, in closing arguments, Mr. Vaughn told the Jury that Donald Clark came and took this trial risk because he believed in this system and he felt like he was innocent. And that's why we went to trial, that's why we spent a month of the Court's time in trying to show the Court that Mr. Clark was not guilty of any conspiracy. Mr. Clark was involved in growing marijuana in 1985, he pled guilty to those charges when he had a chance to go to trial. In 1987, he pled guilty again to a violation of probation when he could have challenged that certainly as a subterfuge because he felt he had paid his penalties to society. Clearly, we've got double jeopardy because we want to establish some certainty. I understand that this is not double jeopardy as we commonly know it, but clearly this is double jeopardy in the fact by pleading guilty he certainly put the gun in the hand of the United States Government so they could put a bullet in his head today. Mr. Clark admitted and lived up to everything that he did back then, he accepted his responsibility, he came to trial to prove that he was not a conspirator, not that he didn't cultivate marijuana, he admitted that he did that and he took his punishment for that. He's here today because he took that risk and I would suggest even though we're

talking about how much the Jury knew, it's clear in the articles in the paper the Jury had no idea of what a conspiracy was when they walked out of here. Mr. Clark is looking at a life sentence without Parole based on something that he did in 1985 prior to the enactment of any Sentencing Guideline in 1984, Sentencing Reform Act that passed, but there were no guidelines. 1987, November, they kicked in and applied and evolved to the stage we are now. There's no way Donald Clark could have ever known back in 1985 when he was putting his hands in the State of Florida he was going to be looking at the possibility of going to prison for the rest of his life by pleading guilty for an act he committed back in 1985. Certainly I ask the Court for leniency and mercy. Donald Clark is a good man. I have gotten to know him over these last two years. I may have questioned his judgment as to how he's handled some things, but I really believe that he believed and he kept asking me how can this be happening, and having studied law, I try to explain how it happened, but it doesn't make sense to me even as we stand here today.

Judge, a lot of people have written letters about Donnie Clark. He's really a hard-working person, he's always been honest. His visit with the underworld of growing marijuana is his only straying from the straight and narrow. I heard this just early this morning, you showing mercy to people that have had severe sentences involving personal injury or violence to an earlier fella here and you gave the guy a break. These bank robbers are looking at five years in prison. Donald Clark is looking at a minimum mandatory of life imprisonment because in 1985 he grew nine hundred pot plants when he did his punishment with the State of Florida. I only want it on the record, I can only state that Mr. Clark does not deserve this, that there's a better way, the Government is all here with their agents, they want the big deal sought so they can go back

to the other twenty-six people who pled and say now, look, this is what's going to happen to you. Donnie Clark's going to prison for the rest of his life, you better talk, tell the truth, better show us the money, you better show us the pot. Donald Clark became convicted and you can give him a sentence other than life in prison. That's what we ask you to do.

THE COURT: Mr. Vaughn, do you wish to say anything before I hear from Mr. Clark.

MR. VAUGHN: No, Your Honor.

THE COURT: All right. Mr. Clark, sir.

THE DEFENDANT: No, ma'am.

THE COURT: Anything the Government wishes to say in aggravation or mitigation?

MR. FURR: Just briefly. It's obvious what Mr. Clark is going to receive in terms of a sentence. However, in response to the argument by counsel just a couple minutes ago, you know, older people when they're around kids owe them something in terms of their conduct. Look what's happened to this man. The little community out in the middle of nowhere, Manatee County, seems like half the people there, half the young men there are in jail and why are they in jail? They're in jail because they got into the marijuana business, that was the thing to do. And the man over here is one of people that made it the thing to do. His two sons are looking at having their lives destroyed because of this. He's got a daughter-in-law going to jail for this. Probably every friend of his kids are tied up in this. When these kids, little more than kids, came to him and asked him things, it wasn't get out of the marijuana business, it was how you can do it better. This stuff was known as Clark bud when they were in high school. He owes them an apology for how he lived his life. The Government doesn't owe him anything. I feel sorry he's going jail for as long as he is, I really do. At the same time, I feel sorry

for each one of the people in jail, the ones that are going to jail and that's not very pleasant. They all have family, they all had something they wanted to do in life. But instead, a little community out there has been basically destroyed because of this. This is one of the reasons right over here. That's all I have to say.

MR. VAUGHN: I have one brief rebuttal, Your Honor. The reason Donald Clark is going to jail is because of his sons, it's not because his sons are going to jail because of Donald Clark. All the evidence that the Government put on had Duane Clark and his other son in the marijuana business prior to any testimony that Donald Clark was in the marijuana business. All the other people that these so-called innocent children that Mr. Clark helped succumb to the evils of growing marijuana, that was testimony throughout the trial, they were in the marijuana business before Donald Clark was in the marijuana business and they were in the marijuana business many years after Donald Clark. If these people weren't in the marijuana business, the Government wouldn't be here today.

Mr. Clark served his sentence back in 1985 because all the testimony says Donald Clark had nothing to do with marijuana after, then he told them that he didn't even want them on the ranch anymore. That's straight out testimony of their witnesses, Your Honor. Donald Clark is being punished because he went to trial. These other people are cutting deals, anything from probation, I think the maximum sentence is twelve years that I've heard about. Donald Clark, it's an insult to me as an attorney and really makes me question the profession. We're here to try cases, Your Honor, not to punish somebody for exercising their right to go in to trial. That goes against every reason why you're here. why we're here and why the Defendant is here. We're here to go to trial, Judge, that's our Constitutional Right, and it's become a system now

where you are punished if you go to trial. You're going to get life in prison instead of probation or five years if you exercise your right to go to trial. It doesn't matter whether you believe you're innocent, that doesn't matter. The bottom line is you go to trial, you're going to be punished, not for the crime, but for going to trial. Real people in this case, the real people who were the major players, the Mark Masseys, the Duane Clarks or whoever was involved, the real people in this case, Your Honor, are going to get a slap on the wrists according to what Donald Clark's going to get. It wasn't Donald Clark that put his sons in jail, that's the other way around and that's because he's exercising his Constitutional Right to go to trial because in his heart to this day, I can tell the Court that he believes he's innocent of this conspiracy.

THE COURT: Okay. Now, Ladies and Gentlemen, I have been confronted as have other Judges been confronted with a number of people involved in drug activities in the last past several years in particular. This Court has had the responsibility and the privilege of being a judicial officer for over eighteen years. It is never any great pleasure for this Court to sentence anyone and it isn't. And this Court does have a responsibility to fulfill its duty and to make some observation or some comments.

Mr. Clark, this is not going to be long because you're getting a heavy sentence. During the course of the trial, I want you to know that I told your attorneys more than one occasion that it needed to be explained to you, and I think I even took it upon myself to explain to you the dual jurisdiction concept, that the State of Florida was separate and apart from the United States of America, and that the commission of a crime could be a crime against the State of Florida and a separate and distinct prosecutable crime against the United States of America. Whether you agree with it or not, whether you think it's right or wrong, that's the law.

Now, Mr. Ostrander has alluded to double jeopardy. I don't want you to misunderstand double jeopardy. It doesn't apply when we're talking about two separate jurisdictions. Further, Mr. Vaughn has talked about the exercise of Constitutional Rights and being punished for going to trial. You have an absolute right as does everybody who is charged with a crime to go to trial. When people go to trial, the Court hears things that it wouldn't hear normally at the time of a change of plea. One of the considerations that people have when they change a plea is to make sure that the Judge doesn't hear some of the things that the Judge will hear if a case goes to trial. The Judge hears the same things that the Jury hears. You had a Jury trial, you had twelve people from the community who found you guilty of this conspiracy, based upon the evidence that they heard, reasonable inferences that they drew and the law as instructed to them by this Court. So, your right to trial established your guilt. You took the position that you were not guilty. The acceptance of responsibility is something which you have not yet done. There are a lot of people confronted with a lot of crimes that think in their heart they shouldn't be convicted of because they think that that which they were being charged with should not be a crime, but it is a crime. And they get charged with it and they either have to admit their guilt, whether they like it or not. I've had some of that within the last week in front of me in this very Courtroom, or they go to trial and say, you know, I'm not guilty, in my heart I feel I'm not guilty. When a Court has to instruct the Jury and they apply the facts, apply the law to the facts, conviction may occur. That's what happened in your case.

Mr. Furr has talked about the example that you set in the community. Well, only you in your own heart know what kind of an example you set in this community and these other people that are going to be sentenced by this Court, whatever sentences they get

for whatever they did in return for substantial assistance, the benefits they will be deriving will be because, one, they accepted responsibility, and two, they substantially assisted the Government. Now that's the choice they made. You made a choice, they made a choice. The choices were made to get involved in the rug activity by you and by them. These guidelines are harsh. But let me tell you, there are even more harsh guidelines coming. You will see before this year's out in various places the death penalty being sought for people involved in activities similar to yours. This country is perhaps going overboard, but out of frustration with this drug problem. And you're just a — you're feeling the brunt of the frustration of the people in this country and they're telling the Courts, do it, put them away. Don't have any misunderstanding about that. These guidelines were passed to take discretion away from the Court and they're praised in a number of areas.

Mr. Ostrander points out the bank robberies this morning, people who pled to the bank robberies and I don't have any great comfort about what the guidelines are doing on the bank robberies, they're too light. Those sentences are appalling to me, but Judges don't make laws, Congress makes laws. Congress says this fits the crime. I can't question the wisdom of Congress.

The Court having asked the Defendant why judgment should not now be pronounced and no cause to the contrary appearing to the Court and the Defendant and his attorney having made a statement on his behalf and the Court having reviewed the pre-sentence report and pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the Defendant Donald Clark is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of life. If released from imprisonment, the Defendant's placed on supervised release for a term of five years. While on supervised release, the Defendant shall comply with the standard

conditions adopted by the Court in the Middle District of Florida. The Court finds the Defendant does not have the ability, the financial ability to pay a fine or other costs. It is further ordered that the Defendant shall pay the United States a special assessment of fifty dollars which shall be due immediately. The Court finds no reason to depart from the sentence called for by application of the guidelines inasmuch as the facts as found are of the kind contemplated by the Sentencing Commission and the guidelines require a mandatory sentence of life.

The Court having pronounced sentence, does counsel for the Defendant or for the Government have any objections to the sentence and the manner in which this Court pronounced sentence other than those previously stated for the record. Mr. Ostrander?

MR. OSTRANDER: No, Your Honor.

THE COURT: Mr. Furr?

MR. FURR: No, ma'am.

THE COURT: The Defendant is herby remanded for service of sentence. You are now advised of your right to appeal from this sentence within ten days from this date. Failure to appeal within the ten day period shall be a waiver of your right to appeal. The Government may file an appeal from this sentence. You're also advised that you're entitled to assistance of Counsel in taking an appeal. If unable to afford a lawyer, one will be provided for you. There's a further acknowledgement of right to appealment because of trial.

Donald Clark, you have been advised by the Court of your right to appeal and you understand you will waive the right to appeal in this case unless you file the notice of appeal within ten days from this date, the date of the entry of the judgment, today, November 4, 1991, ten days from today. You further understand

that you can appeal through your attorney or by notifying personally the Clerk of the Court of your desire to appeal in sufficient time to allow the Clerk to file the notice before the expiration of the aforementioned ten day period. You have been advised of your right to be represented by counsel for appeal and understand that you may have counsel appointed to represent you on appeal at no cost to you if you're unable to afford counsel. You further acknowledge that you read this and you understand it and that I have read it to you. Madam Clerk, Mr. Ostrander, Mr. Clark has to sign it.

Mr. Ostrander, what are you recommending, requesting for recommendation with regard to site of incarceration. I don't think there's a choice, I think they have to send him to Marianna, further from that, to Colorado. I'm not sure. What do you know, Mr. Furr?

MR. FURR: I don't know.

THE COURT: What does Probation know about that?

THE PROBATION OFFICER: I'm sorry, Your Honor, I have no knowledge of that.

THE COURT: You have no knowledge. What are you requesting?

MR. OSTRANDER: I don't have a —

THE COURT: I will—

MR. OSTRANDER: Marianna.

THE COURT: I will request Marianna, I don't think he's going to get it.

MR. OSTRANDER: Judge, at this time, I need to move the Court for permission for Mr. Clark to have a visit with his grandchildren, if that's possible. They, I guess, contact Sarasota, so we need an order from this Court, although I think he's here now, so if that's —

THE COURT: I don't think, I don't know whether they can accommodate the children downstairs in the holding cell. How many grandchildren we talking about, off the top of my head?

MR. OSTRANDER: Six of them. We can do it any way to accommodate.

THE COURT: Marshal Service, please let me know what they can do with regard to it. I don't know what their demands are down there for accommodation.

THE MARSHAL: We have all the cells full this morning, Your Honor.

THE COURT: Sounds bad. They may, we may have to see about getting an order to direct Sarasota to assist us with regard to this. If you want to prepare an order, Tom, go down and see Glen Davis who is in charge of this, tell me what I need to sign. I'll be happy to sign it.

MR. OSTRANDER: Okay.

THE COURT: All right. All right. And with regard to anything else with regard to Mr. Clark, I assume that you want to be able to pursue whatever you wish to pursue in prison academically, vocationally, you should be evaluated, I assume, you want that?

THE DEFENDANT: Yes, ma'am.

THE COURT: Anything else in the way of special requests, Mr. Ostrander?

MR. OSTRANDER: No.

THE COURT: Mr. Clark?

THE DEFENDANT: No.

THE COURT: Mr. Furr, Mr. Page?

MR. FURR: No.

THE COURT: Mr. Clark, this doesn't give me any great pleasure. I know that is no consolation to you. I want you to know I don't enjoy it. You're excused.

(Thereupon, the proceedings were concluded.

STATE OF FLORIDA

COUNTY OF HILLSBOROUGH

I, CLAUDIA M. FRY, Official Court Reporter for the United States District Court, Middle District, Tampa,

DO HEREBY CERTIFY, that I was authorized to and did, through use of Computer Aided Transcription, report in shorthand the proceedings and evidence in the above-styled cause, as stated in the caption hereto, and that the foregoing pages numbered 1 to 47, inclusive, constitute a true and correct transcription of my shorthand report of said proceedings and evidence.

IN WITNESS WHEREOF I have hereunto set my hand in the City of Tampa, County of Hillsborough, State of Florida, this 4th day of February, 1992.

CLAUDIA M. FRY, Official Court Reporter

By _____

CLAUDIA M. FRY OFFICIAL U. S. COURT REPORTER

Exhibit B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	
V.	)	**Docket No. 90-175-CR-T-17(C)**
DONALD CLARK	)	

Prepared For: The Honorable Elizabeth A. Kovachevich United States District Judge

Prepared By: Pamela D. Lassiter, United States Probation Officer
813/228-2901 (Tampa)

Assistant United States Attorney,
Walter Furr
Room 410, 500 Zack Street
Tampa, FL 33602 (813) 225-7300

Defense Counsel:
Thomas Ostrander (Retained)
1206 Manatee Avenue West
Bradenton, FL 34205 (813) 746-1167

Sentencing Date: November 4, 1991, at 9:30 a.m.

Offense of Conviction: 21 U.S.C. § 846, Count One: Conspiracy to Manufacture, Distribute and Possess with Intent to Manufacture and Distribute 1,000 or More Marijuana Plants, a class A felony.

Mandatory Minimum Applies: (X) Yes or ( ) No

Plea or Verdict: Found guilty of Count One on June 21, 1991; adjudicated guilty.

Date of Arrest July 24, 1990.

Release Status: Detained in custody since July 24, 1990

Identifying Data:

Social Security No.: 262-68-0916 **Date of Birth:** 11/08/40 (Age 50)
U.S. Marshal No.: 11808-018 **Race:** White **Sex:** Male
FBI No.: 47 230 Tl **Citizenship:** United States
Address: P.O. Box 206 **Dependents:** None
Myakka City, FL **Education:** High School

Detainers: None unknown

RE: DONALD CLARK
Codefendants:

MARK DAVID MASSEY — Pled guilty to count one of the Indictment on May 16 1991. Sentencing is scheduled for November 15, 1991 at 9:30 a.m.

DUANE CLARK — Pled guilty to count one of the Indictment on May 16 1991. Sentencing is scheduled for November 15, 1991 at 9:30 a.m.

DANIEL GODWIN	Pled guilty to count one of the Indictment on May 16, 1991. Sentencing is scheduled for November 15, 1991 at 9:30 a.m.
TIMOTHY KAY YOUNG, JR.	Pled guilty to counts one and thirty-nine of the Indictment on May 16, 1991. Sentencing is scheduled for November 15, 1991 at 9:30 a.m.
BRYAN COKER	Pled guilty to count one of the Indictment March 1, 1991. Sentencing is scheduled for October 18, 1991 at 9:30 a.m.
DAVID BRYAN ALDAY	Pled guilty to count one of the Indictment on May 16, 1991. Sentencing is scheduled for November 15, 1991, at 9:30 a.m.
GLEN GAVEL	Pled guilty to count one of the Indictment on May 28, 1991. Sentencing is scheduled for November 15, 1991 at 9:30 a.m.
EARL C. NESS TREY NESS	Pled guilty to count one of the a/k/a Indictment on May 23, 1991. Sentencing is scheduled for November 15, 1991, at 9:30 a.m.

LUKE BRINDLE	Pled guilty to count one of the Indictment on May 20, 1991. Sentencing is scheduled for January 17, 1992 at 9:30 a.m.
KENNETH HARWICK	Pled guilty to count one of the Indictment on May 28, 1991. Sentencing is scheduled for November 15, 1991 at 9:30 a.m.
BUCKLIN GODWIN	Pled guilty to count one of the Indictment May 16, 1991. Sentencing is scheduled for November 15, 1991 at 9:30 a.m.

RE: DONALD CLARK
Codefendants: (Continued)

GARY CLARK	Pled guilty to count one of the Indictment on May 16, 1991. Sentencing is scheduled for November 15, 1991 at 9:30 a.m.
BOBBY ROYCE MADDOX	Pled guilty to count one of the Indictment May 20, 1991. Sentencing is scheduled for November 15, 1991 at 9:30 a.m.
RODNEY TEUTON	Pled guilty to count one of the Indictment on May 23, 1991. Sentencing is scheduled for

	November 15, 1991 at 9:30 a.m.
ARTHUR NESS	Pled guilty to count one of the Indictment on May 28, 1991. Sentencing is scheduled for November 15, 1991 at 9:30 a.m.
PHILLIP HARRIS	Pled guilty to count one of the Indictment on May 28, 1991. Sentencing is scheduled for November 15, 1991 at 9:30 a.m.
MARVIN BENTLY	Pled guilty to count one of the Indictment on May 23, 1991. Sentencing is scheduled for November 15, 1991 at 9:30 a.m.
STEVEN ARBUCKLE	Pled guilty to count thirty of the Indictment on May 1, 1991. Sentencing is scheduled for November 15, 1991 at 9:30 a.m.
JUDY CLARK	Pled guilty to count one of the Indictment on May 22, 1991. Sentencing is scheduled for November 15, 1991 at 9:30 a.m.
ROBERT ARBUCKLE	Pled guilty to count thirty of the Indictment on May 1, 1991. Sentencing is scheduled for November 15, 1991 at 9:30 a.m.

TRACEY SHIRLING	Pled guilty to count one of the Indictment on May 22, 1991. Sentencing is scheduled for November 15, 1991 at 9:30 a.m.

RE: DONALD CLARK

Codefendants: (Continued)

KAYUS HARWICK	Pled guilty to count one of the indictment on May 23, 1991. Sentencing is scheduled for November 15, 1991 at 9:30 a.m.
MATT GODWIN	Pled guilty to count one of the Indictment on May 16, 1991. Sentencing is scheduled for November 15, 1991 at 9:30 a.m.
WILLIAM OWEN BARTRUFF	Pled guilty to count one of the Indictment on May 23, 1991. Sentencing is scheduled for November 15, 1991 at 9:30 a.m.
ANTHONY CHARLES LEE	Pled guilty to count one of the Indictment on May 23, 1991. Sentencing is scheduled for November 15, 1991 at 9:30 a.m.
JACK BENTLEY, JR.	Pled guilty to count one of the Indictment on May 1, 1991. Sentencing is scheduled for

November 15, 1991 at 9:30 a.m.

ED LAST NAME UNKNOWN	Pending arrest.
Related Cases:	See criminal history section.
Co-Offenders:	
91-67-CR-T-1 7(B)	
GRADON WILGUS	Pled guilty to count one of the Indictment on April 23, 1991. Sentencing is scheduled for November 15, 1991 at 9:30 a.m.

RE: CLARK, DONALD

PART A. THE OFFENSE

Charges and Convictions

1. A 39-count Indictment was filed in the Middle District of Florida on July 20, 1990. **MARK DAVID MASSEY, DUANE CLARK, DANIEL GODWIN, TIMOTHY KAY YOUNG, JR., BRYAN COKER, DAVID BRYAN ALDAY, GLEN GAVEL, EARL C. NESS a/k/a TREY NESS, LUKE BRINDLE, KENNETH HARWICK, BUCKLIN GODWIN, GARY CLARK, BOBBY ROYCE MADDOX, RODNEY TEUTON, ARTHUR NESS, PHILLIP HARRIS, MARVIN BENTLY, STEVEN ARBUCKLE, JUDY CLARK, ROBERT ARBUCKLE, TRACEY SHIRLING, KAYUS HARWICK, MATT GODWIN, WILLIAM OWEN BARTRUFF, ANTHONY CHARLES LEE, JACK BENTLEY RICHEY, JR., and ED LAST NAME UNKNOWN (LNU),** are charged in count one of the Indictment with conspiracy to manufacture, distribute,

and possess with intent to manufacture distribute 1,000 or more marijuana plants from about 1981 through the date of the Indictment, July 20, 1990, in violation of 21 U.S.C. § 846.

2. Counts two and three charged **TIMOTHY KAY YOUNG, JR., GLEN GAVEL,** and **ANTHONY CHARLES LEE** from the fall of 1986 through the spring of 1987, with aiding and abetting in the possession with intent to manufacture and distribute 100 or more marijuana plants, and maintaining property located in the vicinity of State Road 64 and Duette Road for the purpose of manufacturing marijuana, in violation of 21 U.S.C. §§ 841, 856 and 18 U.S.C. § 2.

3. Count four charged **TIMOTHY KAY YOUNG, JR., BRYAN COKER,** and **GLEN GAVEL**, from the spring of 1987 through the fall of 1987, with aiding and abetting in the possession with intent to manufacture and distribute 100 or more marijuana plants (approximately 1,657), in violation of 21 U.S.C. § 841, and 18 U.S.C. § 2.

4. Count five charged **TIMOTHY KAY YOUNG, JR., BRYAN COKER, GLEN GAVEL AND EARL C. NESS, a/k/a TREY NESS,** with maintaining property located in the vicinity of School House Bay in Manatee County for the purpose of manufacturing marijuana around April 1987, in violation of 21 U.S.C. § 856 and 18 U.S.C. § 2.

5. Counts six and seven charged **DANIEL GODWIN, TIMOTHY KAY YOUNG, JR., BRYAN COKER, DAVID BRYAN ALDAY, LUKE BRINDLE,** and **JACK BENTLEY RICHEY, JR.,** from about 1987 through 1988, with aiding and abetting in the possession with intent to manufacture and distribute 100 or more marijuana plants (approximately 5,000), and maintaining property located in the vicinity of Ft. Green Road in Hardee County, Florida for the purpose of manufacturing marijuana, in

violation of 21 U.S.C. §§ 841 and 856, and 18 U.S.C. § 2.

6. Counts eight and nine charged **DANIEL GODWIN** and **RODNEY TEUTON,** in 1987, with aiding and abetting in the possession with intent to manufacture and distribute 150 or more marijuana plants (approximately 150), and maintaining property located in the vicinity of Myakka State Park for the purpose of manufacturing marijuana, in violation of 21 U.S.C.§§ 841 and 856, and 18 U.S.C. § 2.

7. Counts ten and eleven charged **MARK DAVID MASSEY** and **DUANE CLARK,** from an unknown date to about August 18, 1988, with aiding and abetting in the possession with intent to manufacture and distribute 100 or more marijuana plants (approximately 976), and maintaining property located in the vicinity west of Interstate 75 and Buckeye Road for the purpose of manufacturing marijuana, in violation of 21 U.S.C.§§ 841, 856 and 18 U.S.C. § 2.

8. Counts twelve and thirteen charged **MARK DAVID MASSEY, DUANE CLARK,** and **GARY CLARK,** from an unknown date continuing until around November 16, 1988, with aiding and abetting in the possession with intent to manufacture and distribute 100 or more marijuana plants (approximately 820 pounds of marijuana plants), and maintaining property located in the vicinity of Bullfrog Creek and Highway 301, for the purpose of manufacturing marijuana, in violation of 21 U.S.C.§§ 841, 856, and 18 U.S.C. § 2.

9. Counts fourteen and fifteen charged **MARK DAVID MASSEY** and **DUANE CLARK** with aiding and abetting in the possession with intent to manufacture and distribute 100 or more marijuana plants (approximately 650 plants), and maintaining property located in the vicinity of Carter Road and Buckeye Road for the purpose of manufacturing marijuana from an

unknown date to about November 1, 1988, in violation of 21 U.S.C. §§ 841, 856 and 18 U.S.C. § 2.

10. Counts sixteen and seventeen charged **TIMOTHY KAY YOUNG, JR.** and **BRYAN COKER** with aiding and abetting in the possession with intent to manufacture and distribute 1 00 or more marijuana plants, and maintaining property located in the vicinity of Hogtown Slough for the purpose of manufacturing marijuana from the spring of 1988 through the fall of 1988, in violation of 21 U.S.C. §§ 841, 856 and 18 U.S.C. § 2.

11. Count eighteen charged **BUCKLIN GODWIN, BOBBY ROYCE MADDOX, MATT GODWIN,** and **ED LNU** with aiding and abetting in the possession with intent to manufacture and distribute 100 or more marijuana plants in the fall of 1989 in DeSoto County, Florida, in violation of 21 U.S.C. § 841, and 18 U.S.C. § 2.

12. Count nineteen charged **DANIEL GODWIN, TIMOTHY KAY YOUNG, JR., DAVID BRYAN ALDAY,** and **LUKE BRINDLE** with aiding and abetting in the possession with intent to manufacture 100 or more marijuana plants around 1988 in Manatee County, Florida, in Violation of 21 U.S.C. § 841 and 18 U.S.C. § 2.

13. Count twenty charged **DANIEL GODWIN, TIMOTHY KAY YOUNG, JR.,** and **DAVID BRYAN ALDAY** with maintaining a house located in the vicinity of 37180 Singletary Road, Myakka City, Florida, for the purpose of manufacturing marijuana in 1988 in Manatee County, Florida, in violation of 21 U.S.C. § 856, and 18 U.S.C. § 2.

14. Count twenty-one charged **MARK DAVID MASSEY, DUANE CLARK, KENNETH HARWICK, JUDY CLARK, and KAYUS HARWICK** with aiding and abetting in the possession with intent to manufacture and distribute 100 or more marijuana plants in 1988 in Manatee

County, Florida, in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2.

15. Count twenty-two charged **MARK DAVID MASSEY and DUANE CLARK** with maintaining a house located on Gill Road in the vicinity of Verna Bethany Road for the purpose of manufacturing marijuana in 1988 in Manatee County, Florida, in violation of 21 U.S.C. § 856 and 18 U.S.C. § 2.

16. Count twenty-three charged **MARK DAVID MASSEY, DUANE CLARK, KENNETH HARWICK, and TRACEY C. SHIRUNG** with aiding and abetting in the possession with intent to manufacture and distribute 100 or more marijuana plants in December 1987 in Manatee, Florida, in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2.

17. Counts twenty-four and twenty-five charged **MARK DAVID MASSEY and DUANE CLARK** with maintaining a room and barn located at 6490 Erie Road, Parrish, Florida, for the purpose of manufacturing marijuana in December 1987 in Manatee, Florida, in violation of 21 U.S.C. § 856, and 18 U.S.C. § 2.

18. Counts twenty-six and twenty-seven charged **DANIEL GODWIN and GARY CLARK** with aiding and abetting in the possession with intent to manufacture and distribute a quantity of marijuana plants and maintaining property located in the vicinity of Hurricane Bay near McCloud Road and Duette Road in Manatee County, Florida, about 1988, in violation of 21 U.S.C. § 841, 856 and 18 U.S.C. § 2.

19. Count twenty-eight charged **DANIEL GODWIN and GARY CLARK** with aiding and abetting in the possession with intent to manufacture and distribute a quantity of marijuana plants from 1988 through early 1990 in Manatee County, Florida, in violation of 21 U.S.C. § 841, and

18 U.S.C. § 2.

20. Counts thirty and thirty-one charged **MARK DAVID MASSEY, STEVEN ARBUCKLE, and ROBERT ARBUCKLE** with conspiracy to import one kilogram or more of cocaine into the United States and importation of one kilogram or more of cocaine from the fall of 1985 through the spring of 1986 in Manatee County, Florida, in violation of 21 U.S.C. § 963, 952, and 18 U.S.C. § 2.

21. Counts thirty-two and thirty-three charged **MARK DAVID MASSEY, STEVEN ARBUCKLE, and ROBERT ARBUCKLE** with conspiracy to possess with intent to distribute one kilogram or more of cocaine, and possession with intent to distribute one kilogram or more of cocaine from the fall of 1985 to the spring of 1986, in violation of 21 U.S.C. §§ 841, 846, and 18 U.S.C. § 2.

22. Counts twenty-nine and thirty-four through thirty-eight charged **MARK DAVID MASSEY, DUANE CLARK, DANIEL GODWIN, TIMOTHY KAY YOUNG, JR., BRYAN COKER, and DAVID BRYAN ALDAY,** with conducting a continuing criminal enterprise from an unknown date in 1981 and continuing to the date of the Indictment, July 20, 1990, in violation of 21 U.S.C. § 848.

23. Count thirty-nine charged **TIMOTHY KAY YOUNG, JR.** with money laundering around May 12, 1987, in Manatee County, Florida, in violation of 18 U.S.C. § 1956.

24. **GRADON WILGUS** is charged in docket 91-67-CR-T-15(B) in a one count Information with conspiracy to possess with intent to manufacture and distribute 1,000 or more marijuana plants from about 1985 through the summer of 1990, in violation of 21 U.S.C. § 952 and 841.

25. Since the offense took place on or after November 1, 1987, the Sentencing Reform Act of 1984 is applicable. This offense occurred from about 1981 to July 20, 1990. The November 1, 1989 guidelines were in effect at the time the offense was committed. However, the guidelines effective November 1, 1990, were applied to the facts of this case since there are no ex post facto issues.

Offense Conduct

26. Information obtained from the United States Attorney's Office and special agents of the Manatee County Sheriff's Office reflected the following: This offense involves 29 defendants that conspired from about 1981 to July 20, 1990, to manufacture, distribute, and possess with intent to manufacture and distribute 1,000 or more marijuana plants in Manatee County, Florida. The majority of these defendants resided in a community known as Myakka City, Florida, which is located in rural Manatee County. Many of the defendants are related and/or have known each other since childhood. Since this offense involved immediate and distant family members, childhood friends, and a closely knit community, all defendants had common knowledge of the other defendants' participation in this offense.

27. All defendants participated in the cultivation of marijuana during this ten-year span. The defendants generally fit into three groups. Several of the defendants were "growers." Growers were the owners of the fields and usually ran a field in partnership with one or more other growers. Some of these partnerships were long-term, such as the partnership between **MARK DAVID MASSEY** and **DUANE CLARK.** The growers usually banded together into partnerships for a growing season or for a particular marijuana field. The defendants determined to be growers were **MARK DAVID MASSEY, DUANE CLARK, DANIEL GODWIN, TIMOTHY KAY YOUNG, JR., BRYAN COKER, DAVID BRYAN ALDAY, DON-**

ALD CLARK, GARY CLARK, and occasionally, **ARTHUR NESS, PHILLIP HARRIS,** and **ANTHONY CHARLES LEE.**

28. The next category of defendants were "helpers" who assisted the growers in a variety of ways. They helped clean areas in swamps, build damns, drive vehicles, and perform various physical labor essential to the cultivation of marijuana plants. Defendants who were involved in this manner were: **GLEN GAVEL, EARL NESS, LUKE BRINDLE, KENNETH HARWICK, BUCKLIN GODWIN, BOBBY MADDOX, RODNEY TEUTON, KAYUS HARWICK, WILLIAM OWEN BARTRUFF,** and **JACK RICHEY.** Generally, a "helper" would assist only one grower or a partnership of growers at a time.

29.The final category of defendants were "cleaners" who dealt with the marijuana after it was cut and processed it for distribution. Defendants who engaged in this activity included all of the previously listed defendants and **JUDY CLARK, TRACEY SHIRLING,** and **MATT GODWIN.**

30. Two defendants, **MARVIN BENTLEY** and **ANTHONY CHARLES LEE,** do not fit into either of these categories. **MARVIN BENTLEY** was a distributor of marijuana. He obtained and distributed large quantities of marijuana from several of the growers. **ANTHONY CHARLES LEE** rented and/or leased property he owned to growers on two occasions for fields of marijuana to be grown. The first field was successful, and the second field was partially cut before being found and eradicated.

31. The cultivation of marijuana was typically the same throughout this case. First, one or more of a group of marijuana cultivators would find a swampy area, generally an inaccessible and undesirable, which would provide several factors they needed for a successful marijuana cultivation.

These factors included: regular water, inaccessibility, and light. Some of the spots were located in extremely inaccessible areas, such as, huge swamps, well off any road, while others were in wet areas near 1-75 or other large highways in the Manatee County area. After finding a spot, the marijuana grower decided whether to use either a system of mounds or "floaters" upon which to grow the marijuana. They created mounds by going into the swamp and digging up a pile of mud surrounded by wire. Soil would then be added to the top of the "muckpile," fertilized and chemically treated with lime, or whatever was necessary, and then marijuana seedlings would be placed upon the mound The mounds could then be used over and over again, with little upkeep. In the later stages of this conspiracy, "floater" systems were created by using a large flower pot which fitted into a sheet of styrofoam allowing the flower pot to float on the water in a swamp. The flower pot would be filled with dirt, one or two marijuana seedlings would be planted in it and, again, the plant would be self-sufficient.

32. The defendants grew marijuana of exceptional quality. It is commonly known as "Myakka Gold." it has the highest THC level of any marijuana grown in the United States. They were able to achieve this quality of marijuana by their unique cultivation process. Marijuana plants are either male or female. The male plants do not have the buds, but the female plants do. Male and female marijuana plants grow at different rates. The growers were well aware of that and would plant large numbers of marijuana seedlings, either in "floaters" or on the mounds. They would return several weeks later and pull all of the larger plants. The male marijuana plants, at this stage in the growth, were discernable from the female plants. The growers would pull all male plants to allow the female plants to continue to grow. The female plants would begin to bud when they reached maturity and, when there were no more male plants to fertilize them, would send out many buds. After the plants were covered with buds, the growers would

return, cut them down, and dry them for several days. Drying consisted of moving freshly cut plants to another location, such as a barn, where they dried for several days. Several individuals packaged the buds. The marijuana would be placed either in zip lock bags or in vacuum packed bags. No other part of the marijuana plant would be saved. The marijuana distributed from the Myakka City area was obtained from the bud of the marijuana plant only. After being packaged, the marijuana would be ready for sale. The growers generally sold the marijuana for amounts approaching $3,000 per pound.

33. This conspiracy is quite unlike other importation and distribution cases. There was some competition between growers, and occasionally one would steal from another if given the opportunity, but generally the competition appeared to be friendly. The growers and their co-conspirators often cooperated with one another. Many growers changed their associates between growing seasons and/or changed their association from one growing location to another. It was not unusual to see a large grower doing menial tasks to help out another grower on occasion.

34. The conspiracy, which extended over a ten year period, involved approximately a million marijuana plants. This amount was proven during testimony at the trial of Donald Clark and through debriefings of the defendants in this case. During this ten year period, crops were grown not only in Manatee County, but also throughout the Middle District of Florida. Defendants had "grow rooms" where they stored seeds. In the "grow rooms" they grow thousands of small plants. They waited until the plants were a few inches tall and then took them to different areas. The plants were then placed in buckets or mounds. Some of the plants would die due to the surroundings or environment. Defendants would "sex" plants, by pulling all the male plants to prevent pollination. Therefore, it was normal procedure for the defendants to lose approximately half of their crop by "sexing"

them. The debriefings of the defendants consistently confirmed these facts.

35. Throughout this conspiracy, the defendants grow and cultivated numerous marijuana crops. All defendants have cooperated with the government, except for Donald Clark. Testimony and evidence obtained by the Manatee Sheriff's Office, reflected several major crops which substantiated the extent of this case. They are as follows:

36. In the fall of 1986, a large quantity of marijuana crops was grown on the property of **CHARLES ANTHONY LEE** located in Manatee County, Florida. **ANTHONY LEE** was paid $15,000 for each crop which was grown on his property. In addition, **MR. LEE** was paid to allow individuals working the crop to sleep in a trailer on the property. Seedlings for the Lee crop were grown in a shed belonging to **GARY CLARK. BRYAN COKER** provided the lights, which were used to produce the seedlings. **TIMOTHY YOUNG** and others planted approximately 20,000 seedlings in the Lee field. They harvested about half of this crop before it was found by the Manatee County Sheriff's Office.

37. School House Bay is a large swamp area in Manatee County, Florida. In April 1987, marijuana plants were seized by the Manatee County Sheriff's Office from this area. On or about August 18, 1987, 401 plants were seized by the Sheriff's Office. **BRYAN COKER, TIMOTHY YOUNG,** and an unindicted co-conspirator, prepared and planted the field. **GLEN GAVEL** dropped them off at the field. **EARL NESS a/k/a TREY NESS** flew over the property and used an ultralight airplane to do surveillance. Police officers in the marijuana field observed **EARL NESS** as they attempted to apprehend the growers in the field. This field later was replanted and additional marijuana was seized in the fall of 1987.

38. In 1987, **BUCKLIN GODWIN** and **RODNEY TEUTON** grew a

marijuana field located in the northeast corner of Myakka State Park. The field consisted of approximately 200 plants grown in plastic buckets.

39. A field of marijuana was grown off-Fort Green Road near Ona, Florida. The field was in operation during 1987 and 1988, and was owned by **TIMOTHY YOUNG** and **BRYAN COKER.** They grew approximately **5,000** seedlings for this field. They estimated that they received approximately **30** pounds of marijuana worth approximately $2,400 a pound from this crop.

40. In 1987 and 1988, **ARTHUR NESS** had a field with an unindicted co-conspirator. They prepared eleven mounds and planted approximately 4,500 starter plants in a patch.

41. A field was located in 1987 and 1988 near Lorraine Road in Manatee County, Florida. Eighteen mounds were harvested from this field. The same site was used again in 1988. However, the crop was seized by the Sheriff's Department. The Manatee County Sheriff's Office seized and destroyed 2,423 plants. **DUANE CLARK** had provided the seedlings for the 1988 crop.

42. In 1988, near Horsecreek on State Road 62, **TIMOTHY YOUNG, BRYAN ALDAY,** and **DANIEL GODWIN** cultivated three fields of marijuana on this property. The planting area consisted of three spots. The first spot contained fifteen mounds. The second contained thirty mounds, while the third spot consisted of 200 buckets. They harvested marijuana and took it to Myakka City, Florida. The marijuana was hung in a barn near **DANIEL GODWIN's** home and trimmed in **TIMOTHY YOUNG's** house. **DANIEL GODWIN, BRYAN ALDAY, TIMOTHY YOUNG, BUCKLIN GODWIN,** and others spent about three days manicuring the marijuana. The cleaners were paid $14 an hour. Defendants

obtained approximately 90 pounds of marijuana from these sites. The marijuana was split between **YOUNG, ALDAY** and **GODWIN. LUKE BRINDLE** assisted in recovering the marijuana.

43. On August 19, 1988, officers seized marijuana plants near the Manatee County Sheriff's Office sub-station in Manatee County, Florida. The field had been planted by **MARK MASSEY, DUANE CLARK, GRADON WILGUS** and others.

44. On November 16, 1988, the Manatee Sheriff's Office seized approximately 802 pounds of marijuana plants at Bullfrog Creek. The field belonged to **MARK MASSEY** and **DUANE CLARK.** It consisted of approximately 140 "floaters." **GARY CLARK** helped place the marijuana in this field and sold a large portion of it.

45. A cooperating unindicted co-conspirator had a house located in Verna Bethany in Manatee County, Florida, in 1988, which was used as a drying or cleaning house for marijuana. **DUANE CLARK** paid the unindicted conspirators $1 0,000. The house was setup **by DUANE CLARK** and the unindicted co-conspirator. The unindicted co-conspirator was paid $10,000 by **DUANE CLARK. MARK MASSEY** also gave him four or five pounds of marijuana. Participants who worked in the cleaning houses parked down the street to avoid notice of activity around the home. Other individuals picked them up and brought them to the home. **KENNETH HARWICK, GRADON WILGUS,** and others were present and participated in the cleaning process. The cleaners were paid $12 an hour to clean the marijuana.

46. In the fall of 1989, unindicted co-conspirators were growing a field of marijuana in Glades County, Florida. They observed helicopters flying around the field as they were returning home one day. They returned to Myakka City and called **DANIEL GODWIN** and **GARY CLARK** who

assisted in removing the plants. They were able to harvest approximately 25 to 30 pounds of marijuana. **GARY CLARK** carried two large metal plates with nails attached to them which he placed as booby traps in the field, hoping that law enforcement individuals would step on them. The following day, **BUCKLIN GODWIN, MATT GODWIN,** and others assisted in cleaning and packaging the marijuana.

47. Various defendants possessed firearms throughout the conspiracy. The majority of the defendants hunted with firearms for two purposes: To check on the crops and to look for places to grow marijuana. They were constantly searching for additional places to grow marijuana. Guns were present in many of the homes where parts of this conspiracy took place. Guns were also found in some of the fields where the growers camped **to** watch or oversee their crops. According to case agents, guns were present in the cleaning and grow rooms. Individuals bringing the marijuana **to** the cleaning rooms after it was harvested often possessed firearms.

Role

48. **DONALD CLARK** is the father of **GARY** and **DUANE CLARK.** He grew marijuana for years. This is substantiated by his prior convictions. **DONALD CLARK** started other defendants in the growing business. He grew seedlings with dirt in a pot. The pots could be placed anywhere. He then sold the pots to the growers, and split the crops with them. He taught them how to cultivate the marijuana. **MR. CLARK** was very active throughout 1985 when arrested. After his conviction, he continued selling marijuana plants. He was arrested again in 1987. During a search of his residence in 1987, he was found to be in possession of 18 firearms. More marijuana plants were also found.

Custody Status

49. Duane Clark voluntarily surrendered to authorities on July 24, 1990. He was transported to the United States Marshal's Office in Tampa, Florida. Mr. Clark appeared before Magistrate Judge Elizabeth A. Jenkins on that date, and a detention hearing was scheduled for July 25, 1990. Mr. Clark appeared before Magistrate Judge Jenkins on that date with counsel. The Court ordered him to be detained without bail.

Victim Impact Statement

50. There is no specifically identifiable victim in the offense of conviction.

Adjustment for Obstruction of Justice

51. The probation officer has no information suggesting that the defendant impeded or obstructed justice.

Adjustment for Acceptance of Responsibility

52. Section 3El.l states that if the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, a two level reduction is warranted. In determining whether or not the defendant qualifies for this provision, appropriate considerations include: voluntary termination or withdrawal from the criminal conduct or associates; voluntary and truthful admission to authorities of involvement in the offense and related conduct; voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense; and the timeliness of the defendant's conduct in manifesting the acceptance of responsibility. This adjustment is not intended to apply to a defendant who puts the government to its burden of proof by trial by denying the

essential factual elements of guilt, is convicted, and only then admits guilt or expresses remorse.

53. Mr. Clark pled not guilty to this offense and went to trial. Upon advise of counsel, he declined to make a statement to the Probation Office regarding this offense. The Probation Office has no information which would warrant a two level reduction.

Offense Level Computation

54. The guideline for 21 U.S.C. § 846 is found in 2Dl.4 of the guidelines. That section states that if a defendant is convicted of a conspiracy or an attempt to commit any offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed. One is then directed to 2Dl.l where the base offense level is determined by the drug quantity taken from the drug table.

55. Section 1 Bl.3 (Relevant Conduct) states that in determining the base offense level, one should include all acts and omissions, aided or abetted by the defendant for which the defendant would be otherwise accountable, that occurred during the commission of the offense, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that were otherwise in furtherance of that offense. Section 1 Bl.3(a)(2) states that with respect to offenses of a character for which 3Dl.2(d) would require grouping of multiple counts, relevant conduct includes acts and omissions that were part of the same course of conduct or common scheme as the offense of conviction. Application note one of that section states that conduct for which the defendant would otherwise be accountable includes conduct that the defendant, counseled, commanded, induced, procured, or willfully caused. In the case of criminal activity undertaken in concert with others, whether or not charged in the conspira-

cy, the conduct for which the defendant otherwise would be accountable includes conduct of others in furtherance of the execution of a jointly undertaken criminal activity that was reasonably foreseeable by the defendant.

56. Section 2D1.1 (a)(3) states that in a case of an offense involving marijuana plants, if the offense involved 50 or more marijuana plants, then each plant is the equivalent of one kilogram of marijuana. Section 2Dl.4 comment (n.2) states that were there is no drug seizure or the actual amount seized does not reflect the scale of the offense, the sentencing judge shall approximate the quantity of the controlled substance. In making this determination, the judge may consider, for example, the price generally obtained from the controlled substance, financial or other records, similar transactions in a controlled substance by the defendant, and the size or capability of any laboratory involved.

57. The total weight of the marijuana used in determining the base offense level includes the amount of drugs seized during the defendant's arrests as outlined in the criminal conviction section. Since these convictions are part of the instant offense, they are considered under relevant conduct. However, these amounts do not affect the total offense level, since the total weight of the drugs in the offense of conviction exceeds the amount needed or required to set the highest offense level.

58. Base Offense Level: During the trial of the defendant, the government proved by testimony and evidence, that the offense involved approximately one million marijuana plants. Debriefings of all defendants in this case, with the exception of the defendant, corroborated this information. The drug quantity table sets 300,000 kilograms or more of marijuana at a base offense level of 42.

59. Specific Offense Characteristics: If a weapon (including a firearm) was possessed during commission of the offense, then the base offense level is to be increased by two levels.Throughout this conspiracy firearms were possessed. Mr. Clark was convicted in 1987, for possession of marijuana, and being a convicted felon in possession of firearms. At the time of his arrest, eighteen firearms were located his possession. One of the firearms was a 9 millimeter submachine gun. All weapons were loaded and were ready for firing. Therefore, a two level increase is warranted. **2**

60. Victim Related Adjustment: None **0**

6l. Adjustment for Role in the Offense: The Probation Officer reviewed Section 3Bl.l of the guidelines. No aggravating or mitigating role adjustment appeared to be appropriate in this case. Mr. Clark was a highly culpable defendant in this case However, he did not organize, manage, or supervise any of the criminal activity. Mr. Clark participated in this offense by teaching others how to grow marijuana. He did not exercise any decision making authority in this offense. Mr. Clark was more of an expert in the cultivation of marijuana and shared this information with other co-defendents. The other codefendants then organized, managed and supervised their own cultivation of marijuana which was quite extensive. The nature of his participation does not warrant any role adjustment.3Bl.4 **0**

62.Adjustment for Obstruction of Justice: **0**

63. Adjusted Offense Level (Subtotal) **44**

64. Adjustment for Acceptance of Responsibility: The defendant has not clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct. A two level reduction is not

warranted. 3El.l **0**

65. **Total Offense Level:** An offense level of more than 43 (the maximum level on the sentencing table) is to be treated as a level 43. Chapter 5, Part A, comment (n.2). **43**

66. **Chapter Four Enhancements:** None

PART B. THE DEFENDANT'S CRIMINAL HISTORY

*(**NOTE.** It is the policy of the Probation Office to assume that all defendants were represented by effective counsel or knowingly waived counsel, in convictions which occurred any time after 1972)*

Criminal Convictions

	Date of Arrest	Charge/Court	Date Sentence Imposed/ Disposition	Guideline/ Score
67.	5/24/85 5/25/85 (Age 44)	Docket 85-821 Count 1: Possession of Cocaine, Count 2: Possession of Paraphernalia, Count 3: Possession of Marijuana; Docket 85-843 Count 1: Possession of Cocaine, Count 2: Felony—Possession of Marijuana, Count 3: Felony—Possession of Marijuana, Count 4: Manufacture of Marijuana; Count 5: Possession of	Docket 85-821: 12/10/85, pled nolo contendere, adjudicated guilty, 2 years community control, $224.50 Court costs; Docket 85-843: 12/10/85, pled guilty to all counts, adjudicated guilty of counts 1, 2, 3, 5 & 6, sentenced to 2	4Al.2(a)(2) **0**

Paraphernalia, and Count 6: Possession of Paraphernalia. Manatee County Circuit Court, Bradenton, Florida.	years community control, each count to run concurrently with Docket 85-821; Count **4:** adjudication withheld, sentenced to **2** years community control to run concurrently with Count 1. Court costs of $224.50; Violation of probation, both cases, 7/27/87, pled guilty, adjudicated guilty, 18 months state prison. Received time served on misdemeanor counts.

The defendant was represented by counsel. In reference to Docket 85-821, a Manatee County Sheriff's Deputy was dispatched to a residence in Bradenton, Florida, regarding a possible drug overdose on February 19, 1981. Donald Clark was present at the residence. A white female overdosed and was unconscious. She was transported to Manatee Memorial Hospital in critical condition as **a** result of a cocaine overdose. Officers located various types of narcotics, paraphernalia, and marijuana in random

areas of the room. No arrests were made at this time, but all narcotics and paraphernalia were taken into custody by the Sheriff's Office.

As a result of the above information, the Manatee County Sheriff's Office began targeting Donald Clark as a suspect in narcotics' manufacturing and supply. After a lengthy investigation, the Manatee County Sheriff's Office obtained a search warrant for the defendant's residence in Manatee County, Florida. The search warrant was executed on May 24, 1985, and numerous small quantities of marijuana, cocaine, and drug related paraphernalia were found scattered throughout the residence. During daylight hours on May 25, 1985, the search of the property was completed. Officers found approximately 900 marijuana plants growing in an environmentally controlled green house type facility located in the back corner of the property. Other marijuana plants were growing in pots in a marshy area, near the ranch property. Taken from the residence was a book indicating detailed drug transactions with known drug traffickers throughout the Tampa Bay Area. Mr. Clark admitted to detectives that he had been growing marijuana for a long time, and that he had made a lot of money from it. The defendant was charged as a result of the search warrant in Docket 85-843.

On February 17, 1987, the defendant was arrested and charged with possession of marijuana and being a convicted felon in possession of firearms. His probation was violated and on July 27, 1987, he was sentenced to 18 months state prison. Mr. Clark reported that he was released from imprisonment on work release in September 1987. He completed his sentence in December 1987.

This is considered part of the conspiracy as charged in the instant offense.

68.	4/22/87 (Age 46)	Count 1: Possession of Marijuana, Count 2: Possession of a Firearm by a Convicted Felon Docket 87-893 Manatee County Circuit Court Bradenton, Florida.	7/27/87: Pled nolo contendere, adjudicated guilty, 18 months state prison to run concurrently with Docket 85-821; sentence expired December 1987.	4A1.2(a)(2)**0**

The defendant was represented by counsel. On February 17, 1987, the Manatee County Sheriff's Office received information that Donald Clark was in possession of 100 pounds of marijuana. The marijuana was reportedly in his living room and in freezers located at the residence. On that date, Manatee County Sheriff's Office Deputies went to the residence of the defendant. Mr. Clark answered the door, and the Manatee County Sheriffs' Office advised that they had received information that he had marijuana inside the home. Mr. Clark invited the deputes into the residence and admitted that there was marijuana there. Mr. Clark then went into his own room and took from the closet a bag of marijuana which appeared to be one fourth and/or one-half pound in weight. An officer confronted the defendant and advised him that they had information to believe that there was a larger quantity of marijuana at the residence. Mr. Clark stated, "Go ahead and look around." In plain view of the family room alongside a pool table, an officer noticed a .243 Winchester rifle. They also located a .22 Ruger rifle on the dining room table. Both weapons were in plain view at the time of the search. They questioned Mr. Clark about other firearms which might be at the residence. He indicated that the barn had several firearms in it. An additional sixteen firearms were located in the barn, including a 9mm submachine gun. All weapons were loaded and were ready for firing.

This case is considered part of the instant offense.

Criminal History Computation

69. **The total of the criminal history points is 0.** According **to** the Sentencing Table (Chapter **5,** Part **A), 0** to 1 criminal history points establish a criminal history category of **1**

Other Criminal Conduct

70. 12/5/77	Trespassing	2/13/78: Charge
(Age 35)	Docket 77-1631-7	dismissed.
	Manatee County Court	
	Bradenton, FL	

No additional information is available.

71. Mr. Clark received in November 1985, a citation for not carrying his driver's license. He appeared in Court in Manatee County, Florida, and entered a plea of not guilty to this charge. He was represented by Gregory Hartman. The defendant provided proof of driver's license, and the case was dismissed in Docket 85-3762-T.

Pending Charges

72. None known.

PART C. SENTENCING OPTIONS

imprisonment

73. Statutory Provisions: The statute requires a mandatory minimum of ten years to life. 21 U.S.C. § 841(b)(1)(A).

74. Guideline Provisions: An offense level of more than 43 is to be treated as a level 43. Chapter 5, Part A, comment. (n.2). Based on a total offense level of 43 and a criminal history category of 1, the guideline Imprisonment range Is Ide.

Probation

75. Statutory Provisions: The defendant is ineligible for probation since the offense is a class **A** felony. 18 U.S.C. § **3561** (a).

76. Guideline Provisions: The defendant is ineligible for probation under the guidelines since the offense is a class **A** felony. 5Bl.l

Supervised Release

77. Statutory Provisions: The statute requires a term of supervised release of at least 5 years. 21 U.S.C. § 841 (b)(1)(A)

78.Guideline Provisions: Section 5Dl.2 states that if a defendant is convicted under a statute that requires a term of supervised release, that term shall be at least three years, but not more than 5 years, or the minimum period required by statute whichever is greater. The statute requires a term of at least 5 years supervised release for this offense. Therefore, the guideline range becomes 5 years. 5Dl.2(a)

Fines

79. Statutory Provisions: The maximum fine is $4,000,000. 21 U.S.C. 841 (b) (1) (A)

80. Since the offense was committed after December 11, 1987, the

Criminal Fine Improvement Act is applicable. That Act provides for no interest on fines of $2,500 or less. Interest on fines over $2,500 accrues beginning 15 days after the date of judgment and is based on the average Treasury Bill interest rate. The interest rate is determined on a quarterly basis and is not compounded. Interest can be waived or limited to a specific amount or for a specific time by the Court. A penalty of 10 percent on delinquent fines and 15 percent on fines in default may be imposed, as well as waived, for good cause. A notice of default must be sent out within 30 days of default.

81.A special assessment of $50.00 is mandatory. 18 U.S.C. 3013

82. Guideline Provisions: The fine range for this offense is from $25,000 [5El.2(c)(3) the Fine Table] to $4,000,000. [5El.2(c)(4))

83.Section 5El.2(i) requires the Court to impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered, subject to the defendant's ability to pay. These costs may include drug and alcohol and/or contract confinement costs. The most recent advisory from the Administrative Office of the United States Courts, dated August 7, 1991, provides the following monthly cost data:

Imprisonment (Federal prison facility)	$1,492.00
Supervision	$115.30
Drug/Alcohol Aftercare	$172.33
Contract confinement	$991.00

Restitution

84 There **is** no restitution owed on the instant offense.

Impact of the Plea Agreement

85. There is no plea agreement.

Denial of Benefits

86. Statutory Provisions: At the discretion of the Court, the defendant, having been convicted of his third possession of drugs offense, shall be ineligible for all federal benefits for up to 5 years after such conviction. 21 U.S.C. § 862(b)(1)(B)

87. This Section does not apply to any retirement, welfare, social security, health, disability, veterans benefits, public housing, or any other similar offenses or other benefits for which payments or services are required for eligibility. 21 U.S.C. § 862.(d)(1)(B)

88. Guideline Provisions: The Court, pursuant to 21 U.S.C. § 862, may deny the eligibility for certain federal benefits of any individual convicted of a distribution or possession of a controlled substance. 5FI.6

PART D. OFFENDER CHARACTERISTICS

Personal and Family Data

89. Donald Ralph Clark was born November 8,1940, in Bradenton, Florida. He is one of two children born to Ralph and Edna Clark. The defendant was raised in Manatee County, Florida. He has resided there all of his life.

90. The defendant's father, Ralph Clark, Jr., died of cancer in Manatee County, Florida. His father owned and operated a cattle and seed business in Manatee County. He was also a Manatee County commissioner for sixteen years.

91. Mr. Clark's mother, Edna Clark, age 70, resides in Samoset, Florida. She receives social security.

92. The defendant has one sibling, Sandra Rawls, who resides at Route 1, Box 216-A, Parrish, Florida. Mrs. Rawls is very supportive of the defendant.

93. Mr. Clark reported that he left home in 1959 to get married. He married Betty Lou DeSear in Georgia. Mr. Clark indicated that the marriage did not work out and that his wife filed for divorce. A final divorce decree was entered in 1961 or 1962. One child was wife filed for divorce. A final divorce decree was entered in 1961 or 1962. One child was born to this union, Sherry Victors, age 32, resides in Myakka, Florida. Mr. Clark reported that after the divorce, his ex-wife was granted custody of the child. He stated that he was not Court-ordered to pay child support.

94. Candice Wilgus confirmed that she married the defendant on April 24,1962, in Sylvester, Georgia. Three children were born during their marriage. Tammy Clark, age 29, resides in Myakka City, Florida. Donald Gary Clark and Duane Clark are codefendants in this case and are presently incarcerated in Sarasota County Jail in Sarasota, Florida. Candice Clark advised that they eventually drifted apart and had different goals. Mrs. Clark was very supportive of the defendant and stated that she maintains frequent contact with him. The defendant and Candice Clark separated in September 1980. A final divorce decree was entered on September 7, 1982, in Manatee County, Florida.

Physical Condition

95. Mr. Clark is six feet tall, and weighs 195 pounds. He said his overall health is good. He is not under any doctor's care and has no history of

any serious medical problems.

Mental and Emotional Health

96. The defendant reported no history of any mental or emotional disorders.

Substance Abuse

97. The defendant reported that he has used marijuana from about 1980 to the time of his arrest. He stated that he smoked marijuana once a day. Mr. Clark said that he used cocaine for approximately two years, from 1984 to 1985, two or three times a week. The defendant stated that he stopped because he did not like it. Mr. Clark reported that he socially consumes alcohol and that is very rare.

Educational and Vocational Skills

98. Manatee County School Records confirmed the defendant graduated on June 4, 1959. He was ranked 272 out of a class of 297.

Employment

99. Mr. Clark reported that he has been self-employed since 1963. From 1965 to 1980, he leased 2700 acres in Manatee County, Florida. He stated that he operated a seed, cattle, and sod farm. He reported that at one time, he was the largest mover of sod on the West Coast. In 1976, he moved out to Clark's Farm in Manatee County where he leased 638 acres of property. He stated that he planted sod and ran a wholesale sod business till his arrest. He also farmed hay, watermelons, tomatoes, potatoes, and leased the property out. He stated that his income varied depending upon the crop.

Mr. Clark reported that in 1990, he earned $30,000. He stated that from 1988 to 1989, he made $150,000. Mr. Clark reported that he averaged between $50,000 to $75,000 a year.

100. The defendant received part of his income from the cultivation of marijuana.

Financial Condition: Ability to Pay

101. Mr. Clark's interest in Clark Farms in Manatee County, Florida, was forfeited by jury verdict on June 21, 1991. It is estimated that the equity in this property is approximately $1,000,000 to $2,000,000. Mr. Clark reported that his only remaining assets are a checking account at C&S Bank with approximately $1,500 available, a truck valued at $2,000, and various farm equipment valued at approximately $65,000. The defendant stated that the farm equipment is held jointly with his son, Duane Clark. Clark Farms was operated by the defendant and his son, Duane Clark. After the defendant and his son were arrested, the business account was depleted for necessary household expenses.

102. Based on the above information, the defendant does not have the financial ability to pay fine or other costs.

PART E. FACTORS THAT MAY WARRANT DEPARTURE

103. The quantity of drugs in the offense vastly exceeds the top of the drug quantity table. Ordinarily this factor would warrant a departure, but the defendant has already qualified for the maximum sentence available under the guidelines which is life.

Pamela D. Lassiter
United States Probation Officer

PDL/bts

Supervisor's Review:

This Pre-sentence Report has been reviewed for accuracy and completeness.

James B. Bishop, Supervising
United States Probation Officer

Donald Clark

DOCKET NO. 90-175-CR-T-17(C)

ADDENDUM TO THE PRE-SENTENCE REPORT

The probation officer certifies that the pre-sentence report, including any revision thereof, has been disclosed to the defendant, his attorney, and counsel for the government, and that the content of the addendum has been communicated to counsel. The addendum fairly states any objections made by counsel.

A position of parties meeting was held on October 30, 1991.

OBJECTIONS

By the Government

The government has submitted no written objections to the pre-sentence report.

By the Defendant

1.Paragraph 58, Base Offense Level [2Dl.l (a)(3), 1 B1.3] - Counsel

objected to a base offense level of 42. He argued that the offense did not involve at minimum 300,000 marijuana plants or as many as 1,000,000 marijuana plants. He stated there was no evidence to substantiate the 300,000 plants and the estimate of 1,000,000 plants was nothing more than conjecture. Counsel stated that much testimony was given during the trial of the defendant concerning the number of plants estimated to have been grown by various growers. He stated that at no time did the number of the plants reach a level of 300,000. Counsel argued that the defendant should only be held accountable for 900 or possibly 1,000 marijuana plants.

It is the position of the probation office and the government that this offense Testimony and evidence was given during the trial of the defendant which substantiated this amount.

2. **Paragraph 59, Firearm [2D1.1(b)(1)]** - Counsel objected to a 2 level increase for a weapon being possessed during commission of the offense. He objected to the reference to Paragraph **68 of** the report, stating that the conviction was not part of the instant offense. Counsel argued that there was no testimony at trial concerning the relationship of the firearms and his defendant's continued participation in the conspiracy.

It is the position of the government that the firearm adjustment is appropriate in this case. Firearms were used in furtherance of this conspiracy to check on the crops and to look for places to grow marijuana. Testimony was given at the trial that when Donald Clark was active in the conspiracy guns were carried out into In addition to guns being present in the defendant's grow room and the fields home. The government considers the defendants prior conviction in 1987, to be the instant offense. The guidelines are applied based upon a preponderance of evidence from the facts; the government is not required to prove all facts at trial.

3. **Paragraph 61, Role [3B1.4, 3B1.2(a)]** - Counsel objected to the defendant not receiving a 4 level role reduction as a minimal participant in the offense of conviction. He argued that the defendant is entitled to a minimal participant adjustment in this offense since he played a minimal role in the "concerted activity." He stated that this adjustment is intended to cover defendants who are plainly among the least culpable of those in the conduct of a group. He stated that the defendant's lack of knowledge and understanding of the scope and structure of the enterprise and of the activities of others it is indicative of a role as a minimal participant. He stated that Mr. Clark's involvement in this offense was limited to his own growing of marijuana and to his involvement with Philip Coker. Counsel also makes reference to the fact that the probation office did not give the defendant any role adjustment under 3B1.4. He argues that it is difficult to understand how the defendant could be held accountable for 300,000 marijuana plants to reach a base offense level of 42, and not be given a increase for role in the offense.

It is the position of the probation officer that although Mr. Clark was a highly culpable defendant in this case, he did not organize, manage, supervise any criminal activity. Therefore, no role adjustment was warranted. It is the position of the government that the defendant was vertically integrated into this conspiracy and was hands-on in all the different phases of the operations. Mr. Clark could not be described as a "minimal participant." A minimal adjustment according to the guidelines is to be used infrequently such as a courier for a smuggling transaction involving a small amount of drugs.

5. **Paragraph 68 [4A1.2(a)(2)]** - Counsel objected to the estimated amount of marijuana in weight. He stated that there was no evidence whatsoever put into the record or take from any any witness which would sub-

stantiate that amount of marijuana. He stated that at the time the amount was less than the amount required to make one marijuana cigarette. He also objects to this conviction being considered part of the instant offense.

It is the position of the probation officer that this conviction is part of the instant offense. The weight of the marijuana, as outlined in the circumstances of this conviction, was taken from a Manatee County Sheriff's Office report. Should this conviction not be considered part of the instant offense, then it would have to be scored under 4A1.1 (a) and assessed 3 points.

6. **Paragraph 100 [No guideline calculation]** - Counsel objected to the statement that the defendant received part of his income from the cultivation of marijuana. He argued that there was no evidence to substantiate that he received any part of his income from the cultivation marijuana. Counsel argued that substantial information had been obtained by the probation office and the government and from the defendant to corroborate that the defendant was a farmer who was able to earn sufficient amounts of money to defray the expenses of his farm and farming equipment from his own farming efforts.

It is the position of the probation office that this is an issue which will not affect any guideline calculations.

It is estimated by all parties that the sentencing in this case will take approximately one hour.

CERTIFIED BY:

Pamela D. Lassiter
United States Probation Officer

PDL/bts

Reviewed and Approved

James B. Bishop, Supervising

United States Probation Officer

Exhibit C

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURTS
ELEVENTH CIRCUIT
JAN 5 1994
MIGUEL J. CORTEZ
CLERK

No. 91-4187

D.C. Docket No. 90-175-CR-T-17

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD CLARK,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

Before EDMONDSON and CARNES, Circuit Judges, and
HILL, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of conviction and sentence imposed by the said District Court in this cause be and the same is hereby AFFIRMED.

Entered: January 5, 1994, 1993
For the Court: Miguel J. Cortez, Clerk
By: Matt Davidson
Deputy Clerk

C-2 **DO NOT PUBLISH**

In The United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURTS
ELEVENTH CIRCUIT
JAN 5 1994
MIGUEL J. CORTEZ
CLERK

No. 91-4187

D.C. Docket No. 90-175-CR-T-17

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD CLARK,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

(January 5, 1994)

Before EDMONDSON and CARNES, Circuit Judges, and
HILL, Senior Circuit Judge.

PER CURIAM:

After reviewing the record and each of appellant's arguments, we affirm the conviction and sentence. On the claims about improper arguments by the prosecution, we note that few of the prosecutor's statements were objected to and conclude that those statements to which there was no objection do not amount to plain error. About the matter of the prosecutor's comment on defendant's failure to testify, we conclude that the defense invited this kind of response when defense counsel first pointed out the jury that defendant had not testified and put forth an explanation for defendant's silence – the supposed weakness of the government's case. In such circumstances, the prosecution in reply had the right to argue that the defendant's failure to testify was due to other reasons – such as, the fear of answering hard questions on cross–examination.

AFFIRMED.

Exhibit D

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURTS
ELEVENTH CIRCUIT
JAN 5 1994
MIGUEL J. CORTEZ
CLERK

No. 91-4187

D.C. Docket No. 90-175-CR-T-17

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD CLARK,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: EDMONDSON and CARNES, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges inactive service not voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

J. L. Edmondson

UNITED STATES CIRCUIT JUDGE